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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

INDEPENDENT WAREHOUSES, INC., PENNSYLVANIA COAL COMPANY and ERIE RAILROAD COMPANY,
Appellants,

vs.

WILLIAM SCHISCLE, Recorder of the Township of SADDLE RIVER, and the TOWNSHIP OF SADDLE RIVER, a municipal corporation of the State of New Jersey,
Appellees.

JAMES THOMPSON,
Appellant,

vs.

SAME
Appellees.

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

APPELLANTS' BRIEF.

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I. The ordinance requires the obtaining of a license and the prepayment of a license fee as a condition precedent to the right of appellants, to conduct an instrument of transportation service in interstate commerce, and imposes taxes, regulations, instructions, and burdens upon interstate commerce, in violation of the commerce clause of the constitution of the United States and the Interstate Commerce Act 46

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IN THE

Supreme Court of the United States

No. 83, October Term, 1946.

Independent Warehouses, Inc., Pennsylvania Coal Company and Erie Railroad Company,
Appellants,

vs.

William Scheele, Recorder of the Township of Saddle River, and the Township of Saddle River, a municipal corporation of the State of New Jersey,
Appellees.

James Thompson,
Appellant,

vs.

Same
Appellees.

APPELLANTS' BRIEF.

(1) Opinions delivered in the Courts below.

The opinions delivered in the Courts below are officially reported as follows:

United States District Court for the District of New Jersey, *Independent Warehouses, Inc., et als* v. *Township of Saddle River*, 52 Fed. Supp. 96; New Jersey Supreme Court, *Independent Warehouses, Inc., et als* v. *Scheele, et al., and James Thompson* v. *same defendants*, 132 N. J. L. 390; New Jersey Court of Errors and Appeals, *Independent Warehouses, Inc., et als.* v. *Scheele et al.*, and *James Thompson* v. *same defendants-appellants*, 134 N. J. L. 133.

(2) Grounds of Jurisdiction.

The ordinance in question, adopted January 25, 1943, is printed at pages 9-11 of the record. Section 1 (R. 9) forbids any person, firm or corporation to conduct or carry on, within the Township, the business of the storage of personal property in a warehouse engaged in storing goods for hire or work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises in which is conducted or carried on the storage of personal property in a warehouse engaged in the business of storing goods for hire, unless and until there shall be granted by the the Township Committee of the Township of Saddle River in accordance with the terms of this ordinance, and shall be in force and effect, a license to conduct said business for the place and premises in or at which said business shall be conducted or carried on.

Section 2 (R. 10) requires a written license application to be filed with the Township Committee, setting forth the name and address of the applicant, the kind or character of personal property to be stored, the location of the place and premises in or at which the business is to be conducted, the total area of the ground space thereof and a diagram of the same. Said application shall be accompanied by a deposit to cover the license fee for the current year in the amount thereinafter provided.

Section 3 (R. 10) prescribes an annual license fee to be computed on the basis or rate of three-quarters (¾) of a cent for each square foot of the total ground area of the place or premises in or at which said business is conducted or carried on. Said license shall expire on January first of

each year, and the license fee is required to be payable in advance for each year or part thereof, and is expressly declared to be imposed for revenue. The Township Committee is empowered to revoke any such license for sufficient cause after notice and hearing.

Section 7 (R. 10-11) imposes, for violations, imprisonment in the county jail or in any place provided by the Township for the detention of prisoners, for a term not exceeding 90 days or a fine not exceeding $200., or both. In default of payment of any fine, the magistrate is empowered to imprison the convicted person for any term not exceeding 90 days, and to issue execution against the goods and chattels of any convicted person, firm or corporation, to be levied and enforced in the same manner as are executions from a small cause court. Section 7 also provides that each day that a violation of any of the terms or provisions of the ordinance shall continue shall constitute a separate offense.

Independent was convicted on November 30, 1943, before the Recorder of conducting a storage business for hire "at a certain place called Coalberg, appearing on the Assessment Map as Block No. 106-D", without first having obtained a license and prepaying an annual license fee, as required by section 1 of the ordinance (R. 6-9).

Appellant, James Thompson, an employee, was, on the same day, convicted before the Recorder, on the charge that he "worked in, occupied or utilized" the same premises for which his employer had failed to obtain a license, and prepay the license fee, for the conduct of that business (R. 14-15).

For such violations, Independent was fined $200., and execution was directed to issue against its goods and chattels for the collection of the fine (R. 12). James Thompson was fined $200, and in case of default of the payment thereof he was ordered to be imprisoned in the county jail for a term of 90 days (R. 15).

The "place or premises" specified in the convictions (Block 106-D on the Assessment map) contains an area of 2,730,296 square feet. The annual license fee on that area, at ¾ of a cent per square foot, would be $20,475., which is the exact amount of the assessed valuation of that entire tract of land for 1943 (Ex P-2, R. 18, 76).

The grounds of contest are that said convictions, and the ordinance as applied to the Coalberg Storage Plant were unlawful because:

(a) The place or premises, and the business conducted by Independent, and in which James Thompson was employed, constituted an instrument exclusively used for the transportation of interstate commerce, and that said convictions, and said ordinance, imposed regulations of, and undue burdens upon, interstate commerce, in violation of the Commerce Clause of the Constitution of the United States and the Federal Interstate Commerce Act.

(b) The ordinance was arbitrary, unreasonable, discriminatory and prohibitive, and denied appellants their rights and privileges in violation of the Fourteenth Amendment of the Constitution of the United States.

On May 27, 1946, the Court entered its order noting probable jurisdiction and referring the case to the summary docket.

Statement of Jurisdiction.

(a) Appellate Jurisdiction.

Appellate jurisdiction is conferred upon the Court by section 237 (a) of the Judicial Code *(28 U. S. C. A., sec. 344 (a))* reading as follows:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, * * * or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * * The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Section 861a of 28 U. S. C. A. provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861b of 28 U. S. C. A., provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, * * *, shall be applicable to appeal which section 861a of this title substitutes for a writ of error."

The judgments involved in this case are final judgments of the New Jersey Court of Errors and Appeals, which is the highest court of the State of New Jersey in which a decision in this suit could be had. Article VI, Section I, paragraph 1, of the New Jersey Constitution provides:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes, as heretofore; * * *."

These actions drew in question the validity of an ordinance of the Township of Saddle River, a municipal corporation, and subdivision, of the State of New Jersey, (R. 12-17). In *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 114, this court held that a municipal ordinance "is a statute of the state within the meaning of the jurisdictional provision," of section 237(a) of the Judicial Code (p. 102).

The validity of that ordinance was drawn in question on the ground of its being repugnant to the Commerce Clause, Article 1, section VIII, clause 3 of the Constitution of the United States, and section 1, paragraphs (1) to (6), inclusive, and section 6, paragraphs (1), (3) to (7), inclusive, and (10) of the Interstate Commerce Act (*Title 49, U. S. C. A.*) (Reasons (d), (e), R. 16; Assignment of Errors, paragraph 2, R. 281), and also repugnant to the Fourteenth Amendment, Article XIV, Section 1, of the Constitution of the United States (Reasons (b), (c), (l), (m), R. 16, 17); Assignment of Errors, paragraphs 3, 4 and 5, R. 283-285).

The decision of the Court below is in favor of the validity of said ordinance (R. 265-274).

(b) Substantial Federal Questions.

The Federal questions, and their nature, substance, and effect, are set forth in paragraphs 5 to 14, inclusive, of the Appellants' Statement of Jurisdiction filed herein, and under Points 1 to 5 inclusive (pp. 1-33) of Appellants' brief, filed herein on April 11, 1946, answering Appellees' Statement Opposing Jurisdiction. They are more fully set forth and discussed under the appropriate points of the argument in this brief.

This case does not involve a tax levied directly upon property of any kind, under any law of the State of New Jersey. On the contrary, it involves an unlawful attempt, by a single municipality, to impose a local license, or excise, tax upon, and to regulate, the right of an interstate common carrier to operate facilities, and perform storage-in-transit services, as an integral part of the transportation of coal moving exclusively in interstate commerce, as defined and authorized by the Interstate Commerce Act (49 U. S. C. A., Sec. 1, (3), (a)), and which facilities and services are within the exclusive jurisdiction of the Interstate Commerce Commission, under that Act.

STATEMENT.

(3) The Nature of this Appeal.

This case is before the Court on the joint appeal (R. 280) from judgments of the New Jersey Court of Errors and Appeals, in the two cases, respectively entitled on the cover of this brief, which arose from the same controversy,

were heard on a joint record before the Recorder (R. 15); the New Jersey Supreme Court (R. 17-18) and the Court below (R. 62), and were decided together in a joint opinion in each of the two last mentioned courts (R. 253-257, 265-274).

(4) References.

For convenience, references herein will be: "Independent" refers to Appellant, Independent Warehouses, Inc.; "Coal Company" refers to Appellant, Pennsylvania Coal Company; "Erie" refers to Appellant, Erie Railroad Company; "Recorder" refers to Appellee, William Scheele Recorder of Saddle River Township; "Township" refers to Appellee, Township of Saddle River, a municipal corporation, or sub-division, of the State of New Jersey located in Bergen County; "Court below" refers to the New Jersey Court of Errors and Appeals; "I. C. C." refers to the Interstate Commerce Commission; "Coalberg" refers to the property and facilities in the Township provided by Erie, and used and operated by it, with the aid of contract agents, exclusively for the storage-in-transit, and servicing, under tariffs filed with I. C. C., of anthracite coal moving in interstate commerce over through routes and at through, or joint through, rates from the mines in Pennsylvania to destinations in other states; "Coalberg Tax case" refers to the litigation over coal taxes decided in *Pattison & Bowns* v. *Township of Saddle River, et al*, 129 N. J. L. 135, *aff.* 130 N. J. L. 177.

(5) Correlative Litigation.

Because of its important relation to the enactment of the ordinance involved in this litigation, it is pertinent to refer here to the Coal Tax case, in which the Township assessed for taxation, for the years 1940 and 1941, and levied local personal property taxes against Pattison & Bowns, and a number of other coal companies, who were the owners of coal stored at Coalberg under the Erie tariff involved in the present case.

Those assessments and taxes were set aside on the ground that the coal was in a commercial storage, and was exempt from taxation under a section of the New Jersey tax laws (*R. S. 54:4-3.20*) reading as follows:

> "All personal property stored in a warehouse of any person, co-partnership or corporation engaged in the business of storing goods for hire shall be exempt from taxation under this chapter."

Pattison & Bowns v. *Township of Saddle River, et al*, 129 N. J. L. 135, *aff.* 130 N. J. L. 177.

(6) History of the Present Litigation.

On April 19, 1943 this ordinance was attacked by complaint, filed in the United States District Court, District of New Jersey, against the Township of Saddle River, by Independent Warehouses, Inc. (Pennsylvania Coal Company and Erie Railroad Company, interveners) praying for injunction to restrain the enforcement of the ordinance on substantially the same grounds as those urged in this case. A temporary restraint was issued pending hearing of a

motion for preliminary injunction against the enforcement of the ordinance. After that hearing the court entered an order on November 23, 1943 denying preliminary injunction on the basis of a memorandum opinion, of October 11, 1943, holding that the license fee was a tax imposed by or pursuant to the laws of the state, and that the court was deprived of jurisdiction to grant a preliminary injunction by Title 28 U. S. C. A., section 41, because the courts of New Jersey afforded "a plain, speedy, and efficient remedy at law or in equity." *Independent Warehouses, Inc.* v. *Saddle River Township*, 52 Fed. Supp. 96.

Thereafter, on November 30, 1943, Independent and James Thompson, were arraigned, and convicted, before the Recorder for violation of said ordinance (R. 6-9, 14) as above set forth.

The laws of New Jersey provide:

(R. S. 2:81-8) "When a writ of certiorari is brought * * * to review the proceedings of any special statutory tribunal, * * *, the court shall determine disputed questions of fact as well as of law, and inquire into the facts by depositions taken on notice or in such other manner as may be according to the practice of the court.

* * * The court may reverse or affirm, in whole or in part, such * * * order or proceeding, finding or determination, * * *."

(R. S. 2:81-13) "All judgments or other judicial proceedings of any city judge, police court or other court of inferior jurisdiction had for or on account of a violation of any city ordinance, * * *, whether had with or without jury trial, shall be reviewable by certiorari in accordance with the rules and practice of the supreme court * * *."

Pursuant to said statutes, and in accordance with the rules and practice of the state Supreme Court, appellant, Independent (R. 1), the Coal Company, Erie (R. 2), and James Thompson (R. 1) were allowed writs of certiorari to review in the state Supreme Court the convictions of Independent and James Thompson before the Recorder (R. 6-9, 14).

The state Supreme Court reviewed said convictions upon the returns to the writs made by the Recorder (R. 2-15), the joint record of the evidence taken by depositions on behalf of the parties (R. 18-252), and the "Reasons" filed by the prosecutors (R. 13-17). By stipulation of the parties (R. 17) the proceedings on said writs were presented to the state Supreme Court, and briefed and heard together, on said joint record.

The state Supreme Court filed its joint opinion (R. 253-257) reversing said convictions, and holding that the ordinance in question was invalid as applied to Appellants' business at Coalberg because the ordinance attempted to impose regulations and taxes upon a business that was exclusively interstate commerce, in violation of the Interstate Commerce Act, and because the ordinance was an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power (R. 256).

On Appellees' (here) appeal, the Court below filed an opinion (R. 263-274) and entered judgments (R. 275, 276) reversing the findings and judgments of the state Supreme Court. The judgments of the Court below are before this Court for review on appeal (R. 280).

(7) The Coalberg Plant.

In 1901 the Coal Company acquired three separate and unconnected parcels of land, aggregating 67.25 acres, in the Township (R. 80, 86) to provide a location convenient to tidewater markets for the storage of excess production of coal during certain seasons of the year, in readiness for deliveries in winter months when the demand normally exceeds production and for emergencies caused by mining or transportation interruptions, bad weather or other conditions (R. 81).

Exhibits P-1 (R. 18A, 64) and P-2 (R. 18, 76) show the following facts and information respecting these three parcels of land as of 1943, when the ordinance was enacted and Independent and James Thompson were convicted of its violation. Block and lot numbers are those shown on the Assessment Maps of the Township.

Information	Block 106-D		Block 106-E	Block 102. Lot 1
Assessed areas (sq. ft.)	1,365,148	1,365,148	90,910	108,900
Total Area (sq. ft.)	2,730,296			
Assessed val. per sq. ft.	1¢	½¢	½¢	¾¢
Assessed value (Land)	$13,651.	$6,824.		$ 817.
Av. Ass'd val. per sq. ft.	¾¢		½¢	¾¢
Total ass'd val. Land	$20,475.		$ 455.	$ 817.
Improvements	$113,400.		None	None
Area occupied and used (Sq. ft.)				
Railroad Trks.	462,350			
Storage plant	1,198,500			
Total used area (sq. ft.)	1,660,850		None	None
Vacant unused Area (sq. ft.)	1,068,750		90,910	108,900
License fee ¾¢ per sq. ft.	$ 20,475.		$682.50	$ 817.00
Total taxes on land & imp. levied by Tp.		$7,770.98		
Track areas (sq. ft.)				
Storage plant primarily	107,240			
N.Y.S.&W.R.R. exclusively	188,055			
Joint Plant & N.Y.S.&W.	167,055			
N.Y.S.&W. trackage rights	462,350			

On Block 106-D the coal company constructed storage and handling facilities at Coalberg, including 12 platforms or "floors" for coal piles, pump houses, locomotive house (R. 71-72), power lines (R. 73, 128) with 42 distribution poles (R. 129), engine houses (R. 74, 128), car hauling equipment (R. 129), lighting facilities (R. 75), boiler house, machinery, electric motors, water tank (R. 159-160), loading towers (R. 160), loading chutes (R. 161-162), and tracks (Exs. P-2, R. 18, 76, P-3, R. 19, 76), coal hoppers, track scales, direct track connections with Erie and New York, Susquehanna and Western railroads, and indirect track connections with other railroad lines, and other component parts of a coal storage yard, or plant (Ex. P-1, R. 18A, 64). These facilities and structures are solely adapted to the storage and handling of anthracite coal transported in and out by railroad (R. 85).

(8) Operation of Coalberg Plant.

Prior to February 25, 1939 (R. 85, 109, 127, 128) the Coalberg storage facilities were operated under lease by Pattison & Bowns, and other coal sales companies, as their own private storage place for coal intermediate between the mines in Pennsylvania, where they purchased the coal, and ultimate delivery points. Taxes were assessed and paid on the stored coal as local private property (R. 77, 85).

Effective February 25, 1939, the Coalberg storage plant was surrendered by the lessees, and taken over by Erie and thereafter operated under the following contractual set-up:

(1) July 10, 1939, Agreement between Erie and the Coal Company (Ex. P-4, R. 20, 83) confirms, and commits to writing, an arrangement of February 25, 1939 for operation of the Coalberg plant, for the benefit of, and at the sole expense (including taxes), of Erie, as a public service transportation facility, available to all shippers, for in-transit storage and handling of anthracite coal moving in interstate commerce from Pennsylvania under through routes, at through, or joint through rates, under duly published tariffs, filed with the Interstate Commerce Commission (R. 110), under the provisions of the Interstate Commerce Act. This change in the operation purpose and nature of the Coalberg facilities on February 25, 1939 is shown by Exhibits P-4 (R. 20, 83), P-5 (R. 24, 83), P-6 (R. 28, 84), P-7 (R. 32, 84), and described at R. 83-84, 109, 128, 155; P. 12 (R. 54-58, 110). Coalberg was constituted a regular freight station conducted under the supervision of an Erie agent stationed at the plant (R. 113, 125), who collected the freight and storage tariff charges for Erie (R. 96, 127). The objects stated in the contract include:

(a) Provision of in-transit storage for coal of shippers over Erie, and participating, or connecting, railroad companies.

(b) Avoidance of the diversion of coal shipments to competing railroad lines where similar storage facilities were available (R. 109, 113, 124).

(c) Enabling shippers to finance their coal purchasers through the issuance of negotiable warehouse receipts.

(2) June 20, 1939, Lease from the Coal Company to Independent of the Coalberg plant and facilities at the nominal rental of $1.00 (Ex. P-5, R. 24, 83).

(3) June 20, 1939. Contemporaneous agreement between the Coal Company and Independent (Ex. P-6, R. 28, 84), for rendering the services of a public storage warehouse, and the issuance of warehouse receipts, for coal tendered for storage-in-transit in the accomplishment of the above mentioned transportation objects. A specified fee of 2¢ per ton of stored coal (with an annual minimum of $600.) was provided as compensation to Independent for the warehousing service. The entire expense of operation (including taxes) was to be paid, initially by the Coal Company, but ultimately, by Erie. Receipts from shippers for the issuance of warehouse receipts was to be credited on account of this warehousing service and any excess of revenue from warehouse receipts belonged to Independent.

(4) May 24, 1940: Supplemental Agreement between the Coal Company and Independent (Ex. P-7, R. 32, 84), changing the rate to ½¢ per ton and the guaranteed minimum to $500., as compensation to Independent.

On January 18, 1938, Erie Railroad Company filed its petition in the United States District Court for the Northern District of Ohio, Eastern Division, for reorganization under section 77 of the bankruptcy act *(11 U. S. C. A., sec. 205)*, and said petition was approved on the same day.

Trustees of the property of Erie, duly appointed and approved, possessed and operated its property and business, including the establishment on February 25, 1939, of the Coalberg in-transit station and facilities, and the con-

tracts made for that purpose. That property and business was transferred to the reorganized Erie Railroad Company by order number 386, dated December 20, 1941, effective at 12:01 A. M. on December 22, 1941, pursuant to a plan approved by the Interstate Commerce Commission which provided (section D):

> "The reorganized company shall be deemed to have assumed all the contracts of the debtor, * * *, or of the trustees of the property * * *, which shall remain executory in whole or in part upon the consummation of the plan and which shall not have been rejected pursuant to the provisions of section 77".

Re: *Erie Railroad Company Reorganization*, 239 I. C. C. 653; *same case*, 240 I. C. C. 469, 480.

The Coalberg contracts were never disapproved or rejected by the Erie Trustees, but were assumed, and continued, by the reorganized Erie Railroad Company.

(9) Other Functions.

In addition to the in-transit storage function performed for, and at the expense, of Erie, the Coal Company performs in Block 106-D at Coalberg, with part of the same equipment used for the storage plant, the following railroad transportation services for New York, Susquehanna & Western Railroad Company (hereinafter called "Susquehanna");

(a) July 30, 1931. Agreement between Susquehanna and the Coal Company, et als. (Ex. P-9, 40, 85), describes, and provides for the use and maintenance of, 23 switch,

or side, tracks and appurtenances at the Coalberg plant. Certain tracks, occupying an area of 188,055 square feet, are assigned to the exclusive use of Susquehanna. Certain other tracks, occupying an area of 107,240 square feet, are assigned to the primary use of the storage plant. Other tracks, occupying an area of 167,055 square feet, are to be used jointly by Susquehanna and the storage plant, Section Fifth of the agreement provides that Susquehanna has the rights to use any, or all, of the tracks "for general railroad purposes". (R. 125-126). The lengths of, and ground area covered by, those tracks are shown in Exhibits P-1 (R. 18A, 64) P-2 (R. 18, 76) and P-3 (R. 19, 76).

Since the other parties to that agreement surrendered their lease of the plant, and got out of the Coalberg plant in February, 1939, that agreement has been continued as between Susquehanna and the Coal Company (R. 85).

(b) June 12, 1940, Agreement between Susquehanna and the Coal Company (Ex. P-8, R. 36, 85) provides for the use of the Coal Company employees, equipment and facilities for operating pumps and furnishing water from wells on the property for locomotives, and for rendering the common carrier services of billing, weighing and making reports on cars of Susquehanna. Payments for such water and services are deducted from the gross plant operating expense and the balance is paid by Erie as the cost of the transit storage service (Ex. P-10, R. 49, 88).

In March, 1943, ten, but at the time of taking appellants' depositions in this record only six, persons were employed at Coalberg (R. 89).

All of the tracks, facilities and equipment of the Coalberg plant (except the coal storage floors) were used by,

or for the general railroad purposes of freight transfer with connecting carriers, freight classification and holding yard, switching cars to and from storage, watering and servicing locomotives, keeping car records, and other purposes specified in Exhibits P-8 (R. 36, 85) and P-9 (R. 40, 85), and described by the witnesses (R. 125-127, 132, 146-147, 160).

(10) Status of the Parties.

Independent is a corporation of New York, authorized to do business in New Jersey (R. 134). Since June 20, 1939, it has performed warehousing services at Coalberg as the agent of Erie, as a public warehouse for hire, exclusively as an in-transit facility for the storage of interstate shipments of coal (R. 83, 85, 109, 136). As agent of the Erie it had exclusive custody of coal in storage under Erie Tariffs as a public warehouseman, and, when requested to do so, issued warehouse receipts for coal owned by shippers received under railroad waybills (R. 136). Contrary to the statement in the opinion of the Court below (R. 268), Independent is not a subsidiary, but is the contract agent, of Erie.

The Coal Company is a corporation of Pennsylvania and owns and operates mines in the Wyoming region in Lackawanna and Luzerne Counties of that state, for the production of anthracite coal which is all sold and delivered at the mines to purchasers who thereupon become the owners and shippers thereof to various parts of the country (R. 80). All of the capital stock of the Coal Company is owned by Erie (R. 78, 89, 93). The Coal Company holds title to

the Coalberg plant property and provided the employees and equipment for operating the plant (R. 85, 111, 136), solely and exclusively as an in-transit storage facility for shippers of interstate coal under Erie tariffs (R. 80, 83, 109, 112) (except for the above mentioned transportation services rendered for Susquehanna). The coal company owned none of the coal in storage (R. 88, 103, 105, 136, 140).

Erie is a common carrier by railroad in interstate commerce, subject to the Interstate Commerce Act and the jurisdiction of the Interstate Commerce Commission (R. 109). It has the possession and custody, but owns none, of the coal in storage.

(11) Tariff Provisions.

The storage-in-transit services at Coalberg are rendered under, and controlled by, a specific tariff issued, published and filed with I. C. C. pursuant to the requirements of section 1, paragraphs (4) and (6), and Section 6, paragraphs (1) and (4) of the Interstate Commerce Act, hereinafter quoted, or referred to, in part (13) of this Statement.

When these storage-in-transit facilities were inaugurated at Coalberg on February 25, 1939, Erie Railroad Company, Lackawanna and Wyoming Valley Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna & Western Railroad Company and Wilkes-Barre and Eastern Railroad Company, had issued, on January 24, 1939 (effective February 25, 1939), a joint and proportional through tariff on anthracite coal moving in interstate commerce, or through rates, or joint through

rates, on through routes and on through billing, and under the original shipping contract, from stations in Pennsylvania on the above mentioned participating railroads, and Delaware & Hudson Railroad Company, to stations in New Jersey, New York and elsewhere in the New York metropolitan area. Said tariff was duly filed with the Interstate Commerce Commission and is known and identified as tariff number "ICC No. D-1390". A revision of that tariff, issued on July 11, 1940 (effective August 12, 1940), was duly filed with the Interstate Commerce Commission, and since its effective date has been in full force and effect, as tariff number "ICC No. D-1438". Since the pertinent provisions of both tariffs are the same, only the second one was offered in evidence (Ex. P-12, R. 54-58, 110).

Those tariffs prescribed uniform through routes and rates over Erie, or joint through routes and rates over Erie and participating, or connecting, carriers above mentioned, and rules and regulations, applicable exclusively for the transportation, in-transit inspection, weighing, unloading, storage, switching, keeping records and handling of coal, at Coalberg, and the reloading, reconsignment, reshipment, or diversion of coal from Coalberg to final destination, under the original transportation agreements of carriage, for all shippers, or owners, of coal moving in interstate commerce over said railroads from tariff stations in Pennsylvania.

The rates, rules, regulations and practices applicable exclusively to the shipment of anthracite coal, etc., to Coalberg for in-transit storage, were contained in the tariffs above mentioned, filed with the Interstate Commerce Commission (Ex. P-12, R. 55-58, 110-111).

They were joint and proportional tariffs covering shipments of anthracite coal, anthracite briquettes and boulets in carloads from various shipping points, al' ı the Commonwealth of Pennsylvania, on the lines of Erie and the participating or connecting carriers above named.

The tariff provides (p. 3, R. 56) that:

> "Shipments of Anthracite Coal, Anthracite Briquettes and Boulets, in carloads, from points of origin on the ERIE RAILROAD, or connecting carriers as named herein, will be accorded the privilege of storage in stock piles of the ERIE RAILROAD at Rochelle Park (Coalberg) N. J., up to the capacity of the Stock Piles, under the following conditions, and at charges as provided in the following rules:"

The rules provided in the tariff (p. 3, R. 56) include the following:

> "(b) *Method of consignment.* Shipments intended for storage should be consigned to the transit party and be billed to the Stock Pile as destination and such information shown on shipping order."
>
> "(c) *Handling charges.* The Erie Railroad charges for handling at Rochelle Park (Coalberg) N. J., which are to be assessed and collected at the time service is performed, will be as follows:
>
> (1) Unloading from cars into Stock Pile 14¢ per ton of 2,240 pounds.
>
> (2) Reloading into cars for reshipment 14¢ per ton of 2,240 pounds."
>
> "(d) *Time Limit.* The period of time allowed for the storage privilege and protection of the

through rate from point of origin to ultimate destination shall be two (2) years from the date of delivery at storage point, as shown on the inbound freight (expense) bill. The Erie Railroad reserves the right to require owners to remove their coal at the expiration of the two years period. Any coal which is not reshipped within two (2) years will lose the privilege of being reshipped at the through rates from point of origin to destinations beyond the storage yard and freight charges will be collected on the basis of the local rates in effect on the date same size of coal was originally shipped from the mines to Rochelle Park, N. J. and the local rates applicable from Rochelle Park, N. J. in effect at the time shipment is forwarded from storage to the ultimate destination, plus handling charges as shown in Rule C."

"(e) *Rates Applicable to and from Storage.* Lawfully published rate from point of shipment to the Stock Pile, will be assessed. The balance of the through rate to ultimate destination will be assessed when reloaded and reshipped to final destination.

Shipments from storage will be waybilled at the difference in rate which was in effect in tariffs lawfully published and filed with the Interstate Commerce Commission on date of shipment from the mines to the ultimate destination and the rate collected on the coal when it moved into storage at Rochelle Park (Coalberg) N. J.

If coal is reshipped from Rochelle Park (Coalberg) N. J., to a destination taking lower rate from point of origin than rate collected to Rochelle Park (Coalberg) N. J., the rate in effect on date of shipment from point of origin to Rochelle Park (Coalberg) N. J., will apply." (This paragraph is repeated as part of Rule No. 1, p. 4).

"The rates provided in this tariff to the storage yard do not apply for local delivery. The rate in effect to Rochelle Park, N. J., for local delivery, in accordance with Erie R. R. I. C. C. No. D-1301, Tariff No. G. O. 2223 [illegible], or successive issues thereof, will be charged and collected on any coal that may be taken from storage for local delivery."

"Rochelle Park" (as distinguished from "Rochelle Park (Coalberg)") is a local railroad station in the municipality of Rochelle Park, which adjoins the Township of Saddle River where the "Rochelle Park (Coalberg)" station is located (R. 243).

The tariff (p. 3 R. 56) provides for the performance by Erie of certain additional services while the coal is in its possession for storage:

Paragraph (h): Keeping of records.
Paragraph (i): Inspection.
Paragraph (k): Weights.

Paragraph (m) provides (p. 3, R. 56):

"Waybills for all shipments from storage will bear notation 'Accorded Storage Privilege at Coalberg'".

* * * * * *

Rule No. 1 provides (p. 4, R. 57):

"The rates named in this tariff will apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment. When coal is reshipped the rate applicable will be the balance of the through rate from original point of shipment to ultimate point of destination, as published in Erie R. R. tariffs on file with the Interstate Commerce Commission in

effect on date of initial movement from point of origin."

* * * * * * *

Rule No. 3 (p. 4, R. 57) provides:

"In the absence of specific provisions in this tariff to the contrary, shipments transported under this tariff will be entitled to such allowances and privileges and subject to such charges, rules and regulations of originating carriers parties to this tariff, for property while in their possession, and of any of the intermediate or delivering carriers parties to this tariff, for property while in their possession, as are provided in tariffs lawfully in effect and on file with the Interstate Commerce Commission as to interstate traffic * * *, for Terminal or Transit Privileges or Services, including also * * * Diversion, Elevation, * * *, Loading, * * *, Reconsignment, * * *, Stop-off, Storage, Switching, Transfer, Transit Privileges, Unloading, Weighing."

The tariff (p. 5 R. 58) prescribes the rates for transportation of coal from stations in Pennsylvania designated therein, with stop-over and other privileges and services mentioned in Rule No. 3, and provides that they are applicable only on coal consigned to Coalberg for in-transit storage (Rule No. 1, p. 4, R. 57).

This tariff complies in all respects with the requirements of Section 1, paragraphs (4), (5) (a), and (6), and section 6, paragraphs (1), (4) and (7) of the Interstate Commerce Act (49 U. S. C. A.) hereinafter quoted, or referred to, in part (13) of this statement.

(12) Storage-in-Transit Services at Coalberg.

Through the contract agencies of the Coal Company as owner and mechanical operator of the plant, and Independent, as a public warehouseman, Erie operates and utilizes the coal storage plant at Coalberg (except for the above mentioned services rendered by the Coal Company to N. Y. S. & W.) solely to provide regular tariff in-transit services available to all shippers for interstate shipments of coal from the Pennsylvania mines to ultimate destinations through and beyond Coalberg, as a regular transportation service facility over its line (R. 109-110), pursuant to the demands of shippers (R. 111-112).

Coalberg was a regular tariff designated freight station, in charge of a regular Erie agent, for supervising the services prescribed by duly filed tariffs (R. 113, 125, 127), and the collection of transportation and storage charges on the coal (R. 96, 127).

All of the tariff charges for the transportation of the coal and for this in-transit service are collected by the carriers directly from the shippers (R. 127), and Erie bears the entire expense of the transit facilities and services (R. 112, 137). An extra charge of ½c per ton is made by Independent upon such coal owners as obtain warehouse receipts from it (R. 135).

The purpose of storage-in-transit of coal is to provide a reserve coal supply, not otherwise available, for winter consumption of large quantities of various domestic sizes of coal, produced during the warmer seasons of the year when production exceeds consumption, and to facilitate the

current financing of purchases, when desired, by negotiable warehouse receipts under the uniform Warehouse Receipts laws. This method of dealing and transportation is an economic necessity, and provides more uniform:

(a) Employment of miners, and the production and marketing of coal at the mines; transportation and expeditious handling during favorable open seasons of the year; transportation revenues to the railroad carriers, and supply of domestic fuel during the heavy consumption period of the winter months when an adequate supply of coal for domestic use could not otherwise be made available to areas of concentrated population, like the New York metropolitan area of approximately ten million population (R. 80-82), and it tends to reduce:

(b) Railroad congestion, and detention of cars and equipment, during the less favorable winter seasons of railroad operation; and the danger of inadequate fuel supplies at critical seasons which sometimes result from interruptions of transportation or mining operations due to bad weather, strikes and other causes within past experience (R. 81-82, 111-112, 120).

For these reasons, and to prevent loss of traffic by one competing carrier to another, since coal transportation and storage rates on all competing railroads are the same (R. 114, 124), it has been, and still is, the practice of all anthracite carrying railroads to provide such in-transit storage and handling facilities, and services, in compliance with the requests of shippers of coal (R. 82, 109, 111-113).

Such in-transit facilities and services are required by shippers, and are, therefore, necessary to the carriers, for

competitive reasons, and the Interstate Commerce Act (49 U. S. C. A. Secs. 1 (3), 1 (4) provide that they be furnished by the carriers upon reasonable request of shippers. Coalberg was the only facility on Erie lines available for in-transit storage and handling of interstate coal shipments (R. 112).

Under the tariff, and practice, purchasers who ship coal from the mines in Pennsylvania designate on the shipping order their directions for in-transit storing and handling at Coalberg (R. 112). The cars are billed to the shipper, or consignee, solely for in-transit storage at Coalberg and the coal is held in the possession of the carrier until ordered out by the owner (R. 136-137). The coal is then reloaded into railroad cars and continues its railroad journey to ultimate destination under the original shipping contract, at the same through, or joint through, rate under which the first leg of its interstate movement began in Pennsylvania. This entire operation is described in the record (R. 113-114, 119, 135, 137, 164).

No coal is sold at Coalberg (R. 163). Saddle River Township, where the Coalberg Plant is located, had a population of 3,169 at the 1940 census. The coal at Coalberg could not be disposed of locally. There was no market there for it. It was not intended for sale at that point. All of the coal stored and handled there was owned by shippers or consignees of coal shipped in interstate commerce from mines in Pennsylvania to ultimate destinations in, or beyond, the New York metropolitan area, with in-transit stop-over privileges at Coalberg (R. 87-88, 136). All of that coal moves in and out of storage by railroad, under filed tariffs governing its through interstate move-

ment. No coal received for storage comes from any shipping point in New Jersey (R. 136-137, 164).

Under the Coalberg storage tariff the coal remains in common carrier possession throughout the storage period and the owners have no control over it except the tariff privileges of diversion, reshipment or reconsignment, uniformly characteristic of all carload shipments of freight by railroad. Coalberg is not a delivery station.

Rule No. 1 (p. 4, R. 57) of the Coalberg Tariff provides:

> "The rates named in this tariff will apply only to Rochelle Park (Coalberg), N. J., when for storage and reshipment. When coal is reshipped the rate applicable will be the balance of the through rate from original point of shipment to ultimate point of designation, as published in Erie R. R. tariffs on file with Interstate Commerce Commission in effect on date of initial movement from point of origin."

The Tariff (paragraph (b), p. 3, R. 56) prescribes a special method of consignment at point of origin, namely:

> "Shipments intended for storage should be consigned to the transit party and be billed to the Stock Pile as destination and such information shown on the shipping order."

Paragraph (m) (p. 3, R. 56) provides:

> "Waybills for all shipments from storage will bear notation 'Accorded Storage Privilege at Coalberg.' "

Paragraph (4) sub-paragraph (e) of the Coalberg tariff expressly excludes consignment of coal under that tariff

for local delivery at the Coalberg station. That sub-paragraph reads (p. 3, R. 56):

> "The rates provided in this tariff to the storage yard do not apply for local delivery. The rate in effect to Rochelle Park, N. J., for local delivery, in accordance with Erie R. R. I. C. C. No. D-1301, Tariff No. G. O. 2223-H, or successive issues thereof, will be charged and collected on any coal that may be taken from storage for local delivery." (Ex. P. 12, R. 54-58, 110-111).

The separate freight station "Rochelle Park", (as distinguished from "Rochelle Park (Coalberg)") is located in another municipality adjoining that in which the Coalberg station is located (R. 243) and local deliveries, if any, are governed by a different tariff designated in paragraph (2) (e). There is no evidence of any local deliveries having ever been made from Coalberg.

The traffic operation is conducted thiswise: A shipper purchases a car of coal at the mines in Pennsylvania and ships it to himself, or another, at Coalberg solely for storage according to the shipping order as prescribed by paragraph (a) (page 3) of the tariff. On arrival the transportation charges on the first leg of the entire journey are paid to the Erie freight agent at Coalberg Station. The car is switched to unloading position and the coal is placed in storage. At the consignee's direction, the coal is reloaded and moves out by rail to its ultimate destination under the original shipping contract which covered its movement to Coalberg, and he pays only the balance, if any, of the through tariff rate from point of original shipment in Pennsylvania to final destination.

Hence, the coal moves, pursuant to tariff rates, rules and regulations, under the original shipping contracts (called waybills) from its point of mine origin in Pennsylvania to its final destination in other states at the tariff through rate of from $2.30 to $2.50 per ton, according to size of the coal and tariff conditions (Ex. P-12, 54-58, 110) applicable between those points at the time of the original shipment with a stop-over privilege for storage-in-transit at Coalberg, for which the owner of the coal pays to the railroad company an accessorial (additional) tariff charge of 28 cents per ton. These two tariff charges include the transportation, and the services of inspection, weighing, unloading, storage, switching, keeping records and handling, reloading, and reconsignment, reshipment or diversion (R. 110-111, 113-114; Ex. P-12, Rules 2, 3, 6, R. 57, 110, 113-114, 119, 135, 137, 164).

Exhibit P-17, (R.60, 90), described at R. 89-97, shows the amount of coal, of various sizes, in storage at Coalberg on the first of each month, for 1942, 1943, and eight months of 1944.

The reasons for the storage-in-transit of anthracite coal were explained as follows by the I. C. C. in *Rates for Transportation of Anthracite Coal, 35* I. C. C. 220 (1915);

(p. 224)

> "Since this fuel is produced by separating the mine output into eight standard sizes, all these sizes must be produced at the same time. In certain months of each year, however, the consumption of domestic sizes is greater than in other months, and the market demands for the steam sizes in some months exceed and in other months are less than the

normal production. Therefore, if the collieries operate continuously, some of their product must be stored. In past years, to meet this situation, anthracite was quite extensively stored in the carriers' cars for long periods, for which no demurrage charges were assessed, and some of the carriers constructed large and costly storage plants. These plants were equipped with conveyors, engines, electric machinery, and with structures to cover the coal, and the cost ranged from $23,000 to $600,000 each."

Other parts of the evidence in this record will be hereinafter reviewed in the discussion of the particular points to which they apply.

(13) Interstate Commerce Act Provisions Applicable to In-Transit Facilities and Services.

Applicable provisions of the Interstate Commerce Act as amended (Title 49, Transportation, U. S. C. A.) are as follows (italics supplied to indicate portions relating particularly to storage facilities and services).

Section 1 makes the act applicable to common carriers engaged in interstate commerce. The pertinent provisions of that section are as follows:

"(3) (a) * * *. The term 'railroad' as used in this chapter shall include all * * *, the road in use by any common carrier operating a railroad, *whether owned or operated under a contract, agreement, or lease,* and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all *freight de-*

pots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include * * * all *instrumentalities and facilities* of shipment or carriage, *irrespective of ownership or of any contract,* express or implied, for the use thereof, and all services in connection with receipt, delivery, *elevation, and transfer in transit,* * * * *storage, and handling of property transported.*" * * *.

"(4) It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation *upon reasonable request therefor,* and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * * it shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation," * * *.

(5) (a) requires just and reasonable charges "for any *service* rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith" * * *.

(6) "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable regulations and practices affecting * * * all other matters relating to or connected with the receiving, handling, transporting, *storing,* and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms * * *."

Section 6 of the Interstate Commerce Act provides:

"(1) Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried * * *, *and shall also state separately all terminal charges, storage charges* * *, *all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares, and charges*, or the value of the service rendered to the passenger, shipper or consignee * * *. The provisions of this section shall apply to all traffic, *transportation, and facilities defined in this chapter*."

(4) Permits the filing of joint tariffs "by several carriers which are parties to any joint tariff" as specified therein.

(7) Forbids carriers to engage or participate in the transportation of persons or property, unless tariffs of rates, fares and charges upon which the same are transported have been filed and published as provided by this chapter.

(10) Provides penalties for failure or refusal of any carrier to comply with regulations and orders of the commission under the provisions of section 6.

Section 15, paragraph (1) (49 U. S. C. A. Sec. 15, (1)) authorizes the commission on complaint, or on its own motion:

> "* * * to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, * * * and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge * * * and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed".

(14) The Nature and Importance of In-Transit Facilities and Services.

Stop-over privileges accorded to shippers for in-transit storage, and many other services, (commonly called "Transit") for commodities moving in interstate commerce over through routes, and at through, or joint through, rates have existed for many years and have become one of the most universal, economic, important and essential parts of the commerce and railroad transportation of the United States. If storage-in-transit services are allowed to be stricken down, or hampered and regulated, by the conflicting regulations and burdens imposed by individual municipalities, the only alternative will be to abolish such transportation services in such localities and return to the primi-

tive transportation practice of allowing stop-overs only under a combination of local rates, which would retard and hamper, if not entirely disrupt, the present flow of interstate commerce, and greatly increase the transportation costs to shippers and consumers throughout the nation. An impressive list of commodities accorded such privileges may be found in "*The Traffic Library*" (Special Freight Services Part III) (pp. 3-11, 18, 20-21, 23, 27, 34, 46, 66, 67, 69); "*Railroad Rates and Regulations,*" Ripley, 1912 (pp. 401-402) and "*Principles of Transportation,*" Johnson, Huebner and Wilson, 1928 (pp. 50-56).

The following are brief extracts from standard publications dealing with in-transit privileges and services, which summarize, with foot-note citations of supporting authorities, the decisions of I. C. C. and the Courts:

The Traffic Library, Special Freight Services, Allowances and Privileges, Part III, The American Commerce Association, Chicago (1916), Transit Privileges and Rules:

(pp. 3-4)

"The first transit privilege in the United States was granted in 1870 by permitting the rebilling and reshipping of grain at Nashville, Tenn., and since that time the practice has become a part of the transportation service of carriers generally throughout the country."

Transit in many cases is beneficial in its application. When it can be applied without discrimination, it results in the better diffusion of business, in giving to rival communities the relative advantages to which they are entitled, and which can be accorded them in no other way, and, generally speaking, in

the application of lower transportation charges. The commercial operations of this country have, in many instances, developed through the enjoyment of transit privileges and the Interstate Commerce Commission has never held that transit was to be condemned in so far as it was beneficial and could properly be applied."

(p. 5)

"While the transit privilege for a long time was deemed to be optional with the carrier and the jurisdiction of the Commission thereof doubtful, the amendment of the Act of 1906 made it clear that the privilege, in its various forms, was a regulation or practice affecting the rate and of which the Commission had jurisdiction."

(p. 9)

"The Commission has held that it is not unlawful for a carrier, as a part of the contract for through shipment, to allow its stoppage in transit for treatment, such as grading, sorting, cleaning, milling, concentration, etc., and its subsequent forwarding to ultimate destination on a proportional or balance of through rate from the initial origin point."

* * * * * *

"Recognition of transit privilege of a legitimate nature, such as 'transfer in transit,' 'elevation,' etc., is now included in first section of the Act, and 'it is clear that the law recognizes elevation as a facility which a carrier may provide for the benefit of its shippers if it finds it to its interest to do so as an inducement for shippers to send their traffic over its line."

Economics of Transportation, Locklin, Business Publications, Inc., Chicago, 1944

(pp. 644-646)

Transit Privileges:

"There are said to be some 300 commodities commonly granted transit privileges. The privilege is of great importance to industries not located at rate-breaking points. The general effect of the practice is to equalize the advantages of location of competing manufacturers, and to facilitate the decentralization of industry.

"The theory of a transit arrangement is that there is but a single shipment from point of origin to final destination with a stop-over privilege. But since two terminal services are performed at the transit point, the cost of the service is increased. Furthermore, additional cost is incurred because of the records made necessary to prevent fraud. For this reason the carriers are permitted to exact an extra charge for the service, although they do not always do so."

"A number of points regarding in-transit arrangements should be noted. Usually the materials moving to the transit point and those moving out take the same rates. When not, the rate applicable is that of the article with the higher rate. The full local rate to the transit point is ordinarly paid when the article moves into the transit point. When the shipment moves out of the transit point the rate applicable is the balance of the through rate from the original shipping point to final destination. The identity of each shipment is not preserved, but in order to get the balance of the through rate on a shipment from the transit point, in-bound billing must be presented for an equivalent amount of tonnage."

The word "transit" which Mr. Justice Frankfurter characterized as "railroad jargon" was recently defined by him in *Board of Trade of Kansas City* v. *United States* (1942) 314 U. S. 534, 537 (rehearing den. 315 U. S. 826):

> "Since the transit privilege is at the core of this litigation, a brief exposition of its mechanics and manipulations becomes necessary. The privilege of transit enables grain to be shipped from point A to point B, there to be stored, marketed, or processed, and later reshipped to point C at a rate less than the combination of the separate rates from A to B and B to C. See Transit Case, 24 I. C. C. 340; *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 777-79; Locklin, Economics of Transportation (1935) 122-23, 629-31. The shipper pays the local rate on the inbound shipment to the transit point, B in our illustration. A receipted freight bill specifying the point of origin, the rate paid, and other pertinent data, is recorded with the transit bureau as evidence of intention of further transportation of the inbound grain or its equivalent. When the outbound shipment is tendered to the carrier, the freight bill is surrendered in order that the shipper may obtain an outbound rate lower than that which he would otherwise be compelled to pay. The privilege belongs, as it were, to both the grain and its shipper. The benefit attaching to grain shipped into the primary market is commonly so broad that it is transferable not only to another owner of the same grain, but to like grain coming from the same country point.' *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 778."

The general law of transit is stated in 9 American Jurisprudence, Carriers, Section 236, as follows:

"It appears to be established that carriers may lawfully grant stopover, milling-in-transit, and similar privileges, provided they do not thereby unjustly discriminate between particular markets or individuals, or deviate from the provisions of their tariff schedules. The purpose and effect of transit privileges are to give the benefit of a through rate to shippers where, as a matter of fact, there was not a continuous movement of the shipment and where, in fact, in some cases, there has been a change in the character of the shipment. Under such privileges grain may be milled or otherwise prepared; flour may be blended; cotton may be compressed; lumber may be dressed, and perhaps otherwise manufactured; forest products may be creosoted or otherwise treated; structural steel and other materials may be fabricated; crude oil may be refined; livestock may be stopped off for grazing or to test the market; and in some cases products are stored for the shipper and then reconsigned."

(15) Summary of I. C. C. decisions respecting In-Transit Facilities and Services.

The purposes, incidents and benefits of in-transit storage of, and services to, interstate commerce are represented in the following summary of Interstate Commerce Commission and court decisions, as they appear in the official reports.

Transit privileges are allowed upon the theory that the inbound shipment may be stopped and the identical freight or its product, or its exact equivalent of the same commodity moving into the transit point under the same privilege, may be shipped to ultimate destinations under the

through rate from point of origin. *Anderson, Clayton & Co.* v. *St. Louis & S. F. R. Co.*, 17 I. C. C. 12.

A transit privilege is justified on the theory that the inbound and outbound movements are parts of a single continuous transaction, *In re Reduced Rates on Returned Shipments*, 19 I. C. C. 409; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683, under the through rate applicable from the origin point of shipment, *Boone* v. *United States*, 109 Fed. (2d) 560, 563, and that the inbound commodity will be subject to certain treatment and afterwards moved out under the balance of the through rate *Transit Case*, 24 I. C. C. 340.

Transit privileges contemplate movement of a commodity from its origin to a transit point from which, after milling, storing, or fabricating, the entire carload or its equivalent is transported to the final destination, *Fort Smith & W. Ry Co.* v. *Atchison, T. & S. F. Ry Co.*, 216 I. C. C. 411, 414.

Transit privilege permits stopping of goods at an intermediate point and re-shipment therefrom at a through rate, lower than a combination of local rates otherwise applicable. The transit privilege is of great importance to many shippers, and its necessity has long been recognized. *Propriety of Operating Practices—New York Warehousing*, 216 I. C. C. 291, 349.

Transit privileges rest upon the fiction that the incoming and outgoing transport services, which are physically distinct, constitute a continuous shipment of the identical article from point of origin to final destination, *Substitution of Potatoes at W. T. L. Points*, 237 I. C. C. 47, 53.

Transit is a very general term, applicable to numerous arrangements extended to shippers of basic commodities and the products thereof. It is usually granted at points where proper facilities are available, and to require its discontinuance would impose a hardship on many important industries, *Proctor & Gamble* v. *Alabama & V. R. Co.*, 153 I. C. C. 655. The stoppage in-transit of commodities moving on through billing, at through rates, under a continuous shipping contract, from the point of origin, in and out of the transit facility, to ultimate destination, does not interrupt, or alter, the interstate character of the transportation. *North Packing & Prov. Co.* v. *Director General*, 104 I. C. C. 607; *D. A. Stickell & Sons* v. *P. R. R. Co.*, 151 I. C. C. 364; *State of Texas* v. *Anderson, Clayton & Co.* 92 Fed. (2d) 104, 107.

The Interstate Commerce Commission has exclusive regulatory power over such in-transit storage and service, the rates and regulations pertaining thereto, and the instruments or facilities used for such services. *Board of Trade* v. *Ann Arbor R. Co.*, 39 I. C. C. 643; *Peoria B. of Tr.* v. *Atchison T. & S. F. R. Co.*, 55 I. C. C. 42; *Capital Warehouse Co.* v. *Director General*, 66 I. C. C. 683; *Storage at New London & Thamesville, Conn.*, 190 I. C. C. 213-214; *Am. Warehousemen's Assn.* v. *Inland Waterways Corp.*, 188 I. C. C. 13.

In numerous cases the Interstate Commerce Commission has held that elevation and storage is a part of the transportation which the railroad is required to furnish. *Elevation Allowances at St. Louis & East St. Louis*, 30 I. C. C. Rep. 696; *Elevation Allowances at Kansas City*, 34 I. C. C. Rep. 442.

In *Transit Case*, 24 I. C. C. 340; and *Corp. Com. of Okla.* v. *Abilene & S. R. Co.*, 148 I. C. C. 316, the Interstate Commerce Commission held that transit privileges are now a commercial necessity in most cases.

In re Rates & Charges on Grain and Products, 91 I. C. C. 195, the Commission approved transit privileges as affording wider marketing opportunities. It held that they are of benefit to the carriers, dealers and the public, *Grand R. & I. Ry. Co.*, v. *United States*, 212 Fed. 577, 585, heading (6), cert. denied, 234 U. S. 762; *Blodgett Milling Co.* v. *Chicago M. & St. P. Ry. Co.*, 23 I. C. C. 448, and have cheapened the cost of transportation and probably the cost of manufacture, *Central Yellow Pine Assn.* v. *Vicksburg, S. & P. R. Co.*, 10 I. C. C. 193; *Re Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151.

In *Tex-O-Kan. Flour Mills Co.* v. *Atchison, T. & S. F. R. Co.*, 245 I. C. C. 789, the Commission ordered the establishment of storage-in-transit, holding (p. 793) that, transit arrangements permit manufacturers to serve a wider territory, enable consumers to use products that otherwise would not be available and result in additional tonnage for the railroads.

When transportation is interstate, some of its incidents, such as receipt, delivery, *storage*, demurrage, car service, and weighing, assume an interstate character, *Detroit Coal Exch.* v. *Mich. Cen. R. Co.*, 38 I. C. C. 79.

Transit arrangements in certain instances are of benefit to the shipper, also to the carrier, as they have a tendency to hold traffic to the rails, *Livestock to and from the South*, 253 I. C. C. 241, 270. *Commercial Club of Duluth* v. *N. P.*

Ry. Co., et al., 13 I. C. C. 288 (1908), involved storage of freight in railroad warehouses at Duluth, Minn. and Superior, Wis. The Commission in that case said:

(p. 291)

"Complainant challenges the storage principle as in itself unlawful, and therefore not to be justified by competition. This position the Commission, on the record as made, is not prepared to take. The privilege is not given by the defendant carriers only, nor is it confined to the section of the country in which they operate. No justification exists at this time for condemning a practice in which so many carriers and shippers not parties to the record are interested."

In Re Transportation of Wool, Hides, and Pelts, 23 I. C. C. 151 (1912), involving storage, sorting, grading and handling in transit under joint through rates, the Commission said:

(p. 174)

"Transit is a practice of universal prevalence. There is probably not a railroad in the whole United States handling any considerable amount of business into whose tariffs it is not incorporated."

In the *Transit Case*, 24 I. C. C. 340 (1912), the Commission in its considerations of milling, storage and cleaning of grain and grain products, as representative of transit in general, stated:

(p. 348-349)

"These privileges had grown up, and the Commission found them in full vigor when the act to reg-

ulate commerce became a law. In the earlier cases we hesitated, in the absence of power to regulate transit, to lend our approval to the practice. In fact, many carriers and shippers insisted that the practice be abolished altogether and that flat rates be substituted in lieu thereof. However, today transit has become a practice of such universal prevalence upon all the railroads that it has become as much the duty of this Commission under the law as amended to supervise and regulate these rules and practices as the rates, rules, and practices generally of all interstate carriers."

(16) Specification of Assigned Errors to be Urged.

Appellants will urge the assigned errors as set forth in the Assignment of Errors filed herein (R. 281), paragraphs 2, 3, 4, 5, and 1, (in the order presented in this brief).

(17) Summary of the Argument.

The argument is summarized in the headings of the points, respectively, hereinafter presented in this brief.

ARGUMENT.

I.

The ordinance requires the obtaining of a license and the prepayment of a license fee as a condition precedent to the right of appellants, to conduct an instrument of transportation service in interstate commerce, and imposes taxes, regulations, instructions, and burdens upon interstate commerce, in violation of the commerce clause of the constitution of the United States and the Interstate Commerce Act.

(Assignment of Errors, paragraphs 1 and 2, (R. 281), Statement of Points, paragraph I (R. 287).)

The convictions here involved depend upon the validity of the ordinance in question as applied to the in-transit storage business and facilities at Coalberg. The ordinance forbids any person, firm or corporation to conduct or carry on the business of storing personal property for hire, or work in, occupy or directly, or indirectly in any manner whatsoever, utilize any place or premises in which such business is conducted or carried on, unless and until the Township Committee has granted a license in accordance with the terms of the ordinance (Sec. 1, R. 9).

Section 2 (R. 10) requires a written application for a license, accompanied by a deposit to cover the license fee for the current year. Section 3 (R. 10) requires that:

> "Said license fee shall be payable in advance for each year or part thereof. * * *"

Said ordinance attempts, not only to impose a license tax upon the privilege of conducting the business but also, to authorize the Township Committee to determine the withholding or granting of a license (Sec. 1, R. 9), and to revoke a license once granted, for any cause the Township Committee deems sufficient (Sec. 3, R. 10). Sections 4, 5 and 6 (R. 10) impose inspection and regulations, not only upon the business but also, upon "the place and premises where conducted," and "the manner and conduct of said business."

Hence, it lies within the power of the Township to prevent the business from being conducted at all, and the place or premises from being utilized for that purpose.

Applicants contend that the in-transit storage business, and the facilities and services conducted, as described in the parts (7) to (12) inclusive, and governed by the references given in parts (13), (14) and (15), of the foregoing Statement, and the authorities hereinafter cited, are instrumentalities of transportation used exclusively in interstate commerce and that said ordinance, as applied thereto by the Recorder in said convictions, and by the Court below, imposes unlawful regulations, restrictions, directions and burdens upon interstate commerce, in violation of Article I, section VIII, clause 3, of the Constitution of the United States, and the provisions of the Interstate Commerce Act above quoted, or referred to, in part (13) of the foregoing Statement.

The fact that this ordinance does not purport, on its face, to apply to interstate commerce, does not save it if it, in effect, does so, or if, as here, it is attempted to be

applied to an instrumentality of interstate commerce. For that reason it is not necessary to find the ordinance void *in toto*, but only in its application to the present case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 289-290; *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496, 497, 502, 504, U. S. ; *Atlantic Refining Co.* v. *Trumbull*, 43 Fed. (2d) 154, 159.

The Coalberg storage business, facilities and services were established by, and are conducted by contract agencies for the benefit, and at the sole expense (including lawful taxes), of Erie as a part of its interstate transportation business and service as a common carrier, and the ordinance, as applied, imposes taxes, restrictions and regulations therein. The fact that its agent, Independent, and an employee, James Thompson, and not Erie, were convicted of violation of the ordinance, does not affect the merits of Appellants' contentions in this case, since the ordinance, as so applied, would equally affect Erie if it conducted these facilities and services without the aid of contract agents.

The term "railroad", as defined in section 1 (3) (a) of the Interstate Commerce Act, includes 'all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property," "whether owned or operated under a contract, agreement, or lease."

That section defines the term "transportation" as including "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, • • • transfer in

transit, * * * storage, and handling of property transported. * * *."

In *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 506, 513, the court held that railroads, in order to carry on their business as interstate carriers may contract with others to perform the transportation service which they are under a duty to perform. (Citing cases.)

In exact pertinence to this case, the court said (p. 513):

> "But nothing said here is to be taken as indicating that a carrier may not designate a warehouse as a public freight station and select an agent for its management where a forbidden discrimination is not effected."

See also *United States* v. *Fruit Growers Exp. Co.*, 279 U. S. 363, 368.

A situation almost exactly like that at Coalberg is presented in *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41. It involved a similar storage-in-transit facility and service, operated, like Coalberg, under contract through a private warehousing company.

In that case the Court considered an order of the Interstate Commerce Commission regulating the services and rates affecting the storage of grain in-transit. The Court found that the greater part, about 9/10ths, of the grain gathered and carried by the railroad passed beyond its terminii in interstate commerce.

The carrier arranged to store the grain at the terminals on its own line in grain elevators for various transportation purposes, and this facility also enabled it to compete with other roads serving the same general territory (p. 44).

The railroad made a contract with the owner of a grain elevator providing a stipulated price per 100 lbs. for the handling, weighing and storage of the grain at the elevators.

Reference is made to the Hepburn act of June 29, 1906, (now section 1(3), Title 49, U. S. C. A.) defining the term "transportation" to include all the instrumentalities and facilities of shipment or carriage irrespective of ownership or any contract for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer, transit, ventilation, refrigeration, or icing, storage, and handling of property transported, and imposing upon the carrier the duty to provide and furnish such transportation facilities upon the reasonable request therefor, and to establish through routes applicable thereto.

Also, to Section 6(1) of that act requiring the carrier to state separately in its schedules all terminal charges and all privileges and facilities granted or allowed, and that such charges shall be no more than are just and reasonable (pp. 44-5).

The Court stated that Congress clearly recognized that such services were services in transportation and were to be paid for notwithstanding the possibility that some advantage might be gained as a result (p. 45).

The court then said (p. 47):

> "As the carrier is required to furnish this part of the transportation upon request • • • there is nothing to prevent his hiring the instrumentality instead of owning it."

See also *Spencer, Kellogg & Sons*, v. *D., L. & W. Co.*, 197 N. Y. Supp. 380, aff. 199 N. Y. Supp. 951, cert. denied 263 U. S. 712.

Similar situations of stockyard companies conducting facilities, as agents of carriers, for in-transit handling, feeding, and storage of live stock shipments were considered, and likewise decided, in *United States* v. *Union Stock Yard & T. Co.*, 226 U. S. 286, 305, and *Stafford* v. *Wallace*, 258 U. S. 495, 516, 517-519-20.

The same principles and ruling as to in-transit storage and handling of cotton appear in *So. Pac. T. C.* v. *Interstate Com. Comm.*, 219 U. S. 498, 520, 522-3.

In *Railroad Ret. Brd.* v. *Duquesne Warehouse Co.*, 326 U. S. 446, involving employees of a similar storage-in-transit facility operated, under filed tariffs, for the carrier by a contract agent (pp. 448-50), the court held that the services rendered by the contract agent were services performed "in connection with the transportation of • • • property by railroad" (p. 449), and "in connection with • • • the receipt, delivery, • • • storage, or handling of property transported by railroad," under the Interstate Commerce Act (p. 449).

For these reasons the New Jersey Supreme Court, referring to Independent, the Coal Company and Erie, held (R. 254):

> "For the purpose of this litigation they have been, and will be, treated as one entity."

The Court below did not disturb that conclusion.

The Coalberg plant has been officially recognized as as interstate transportation facility:

(a) It was included as one of the appurtenances and facilities used in connection (pgf. 1) with, and one of the instrumentalities utilized (pgf. 4) by, Erie Railroad, and the existing contracts and agreements respecting it to which Erie is a party were ordered to remain in full force and effect (pgf. 5), under the President's Executive order of December 27, 1943, taking over the railroads under Federal control (R. 113).

(b) In so far as it affects the status of the convicted employee, James Thompson, the federal Railroad Retirement Act of 1937 as amended by public law 572, July 31, 1946. (Title 45, U. S. C. Secs. 228a-228r; U. S. C. A. Sections 215-228) defines "employer" as follows:

> "any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any * * * individual or body * * * when in the possession of the property or operating all or any part of the business of any such employer:" (Sec. 228a).

The 1946 amendment defines employee as one "rendering on the property used in the employer's operations * * * personal services, the rendition of which is integrated in the employer's operations."

The Carriers Taxing Act of 1937, imposing taxes on carriers and employees (Title 45, U. S. C. A. Sec. 261) and the federal Railroad Unemployment Insurance Act (Title 45, U. S. C. A. Sec. 351), contain the same definition of "employer".

The characteristic services described in these definitions correspond with the definition of "transportation" in the Act to Regulate Commerce (Sec. 1 (3)) above quoted.

In addition to the rulings of I. C. C. and the courts summarized in part (15) of the above Statement, there are numerous decisions of the Interstate Commerce Commission and of this Court holding that in-transit storage facilities and services are instrumentalities of interstate commerce under section 1 (3) of the Interstate Commerce Act, and are within the exclusive legislative jurisdiction of Congress and the exclusive regulatory jurisdiction of the Interstate Commerce Commission, and cannot be regulated or unduly burdened by state or municipal legislation.

A complete review of the history and purpose of Section 1 (3) of the Interstate Commerce Act is given in the opinion of this Court in *United States* v. *Pennsylvania R. Co.*, 242 U. S. 208. That opinion shows that the question of storage-in-transit was placed within the jurisdiction and regulation of the Commission, that the federal government had therefore preempted and completely occupied the field with regard to regulations affecting interstate commerce in these respects, and that they are features of transportation entirely beyond the jurisdiction of the states.

The validity of this transit service as an instrument of interstate transportation cannot be challenged in this pro-

ceeding or in the courts, since such a challenge involves questions of fact, and matters of inquiry, within the primary exclusive jurisdiction of the Interstate Commerce Commission, under sections 2 and 3 (1) and section 6 (7) of the Interstate Commerce Act, (49 U. S. C. A.) *United States* v. *Wabash R. Co.*, 321 U. S. 403, 413.

In *Southern Ry.* v. *Reid*, 222 U. S. 424, the Court said:

(p. 440)

"And transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery, and handling of property transported, and such transportation the carrier must 'provide and furnish upon reasonable request therefor.'"

* * * * * *

"There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

* * * * * *

(p. 441)

"The question is, Where is the control, in the state or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is demonstrated by the provisions of the interstate commerce act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed, and published, designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the

transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See Robinson *v.* Baltimore & O. R. Co., 222 U. S. 506, post, 288, 32 Supt. Ct. Rep. 114. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties."

The last quoted sentence correctly describes the situation of the railroad company under this ordinance.

Southern R. Co. v. *Prescott*, 240 U. S. 632, 637, defines the duties of the carrier under the interstate commerce act as follows:

(p. 637)

"By the act to regulate commerce (sec. 1) the 'transportation' it regulates is defined as including 'all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, sec. 8563.) It is made the duty of the carrier 'to provide * * *' such transportation upon reasonable request therefor.' All charges made for 'any service' rendered in such transportation

must be 'just and reasonable.' Section 6 requires that the carrier's schedules, printed as provided, 'shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee.' And it is further provided in the same section, that no carrier shall 'extend to any shipper or person any privileges or facilities in the transportation'—that is, as defined—'except such as are specified in such tariffs.'"

Other cases of similar effect respecting storage, and other in-transit privileges, of interstate commerce are *Cleveland, C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, 593-5; *Central R. Co.* v. *United States*, 257 U. S. 247, 257 and *So. Pac. Term. Co.* v. *Interstate Commerce Commission*, 219 U. S. 498, 526.

The New Jersey Supreme Court, which is the statutory trier of the facts (R. S. 2:81-8, quoted in part (6) of the foregoing Statement) made the following finding of facts on this record (132 N. J. L. 390):

"The Erie Railroad Company is a common carrier by railroad engaged in interstate commerce." (Op. p. 391, R. 254; 109.)

"The proofs show that the Erie Railroad Company and Pennsylvania Coal Company have entered into a written contract which provides that coal be shipped to and stored at Coalberg as a public facility

for in-transit storage of coal under railroad tariffs under supervision of an Erie agent stationed at Coalberg, who collects freight and storage charges. The purpose of this arrangement is to provide a reserve supply of coal in large quantities produced in slack season and made available when needed in the winter season and to facilitate the financing of the purchase when desired by negotiation of warehouse receipts. It also appears that shippers of coal require these facilities, that it is necessary for carriers to provide them and that the Federal Act to Regulate Commerce provides that they be furnished by the carriers upon reasonable request of shippers. The fact with respect to this coal is that it is all owned by shippers or consignees and is shipped in interstate commerce from the mines in Pennsylvania to the ultimate destination in, or beyond, the New York metropolitan area with in-transit stopover privileges at Coalberg. None of this coal is sold at Coalberg. All of it is transported in and out of Coalberg by rail" (R. 254-255).

"This business was exclusively interstate. It did not cease to be such by reason of the interruption of the shipment for storage purposes at Coalberg. * * * In the instant case the purpose of the in-transit storage was for the economic reasons stated. Coalberg was not its destination. Its journey was simply interrupted for the purpose of storage and not for sale. It being a subject of interstate commerce it is within the exclusive jurisdiction of Congress and the Interstate Commerce Commission. It may not be interfered with by the imposition of this license fee, which we think was upon the occupation or privilege of carrying on such interstate commerce" (R. 256-257).

The facts above recited are, as the Court below states, "not in dispute" (R. 268), but the Court below reached a different conclusion on the question of legal result.

The Court below stated (R. 267):

> "The regulation of foreign and interstate commerce is a subject within the exclusive jurisdiction of the Congress. This control embraces all of the instrumentalities by which such commerce may be carried on. And, while a state possesses the power to tax property having a situs within its confines, whether employed in interstate commerce or not, it cannot impose a tax for the privilege of engaging in such commerce." (Citing cases.)

That statement of the law can be accepted without further citation of supporting authorities.

The Court below stated that the coal was shipped out of storage at Coalberg—

> "to the ultimate destination at the through interstate rate from the point of origin to the new destination, plus reloading charges, 'as a continuance of the original interstate movement,' and the balance is paid by the shipper at Coalberg" (R. 270).

The Court then stated:

> "The inquiry is whether the regulation lays an unconstitutional burden on interstate commerce, or a tax upon an independent local service, preliminary or subsequent to any interstate transportation" R. 271).
>
> "The determinative question is whether there was a cessation of interstate commerce when the

goods were placed in storage at Coalberg for an indefinite period of time; and here it must be resolved in the affirmative" (R. 272).

The Court below rested its reversal of the New Jersey Supreme Court on the question of interstate commerce, upon the conclusion that, because the ultimate destination of the coal is not determined until the owner gives shipping instructions for the outbound movement:

> "Thus the continuity of the carriage in interstate commerce is broken when the carried commodity is unloaded and stored at Coalberg for an indefinite period, subject to the owner's disposal, and thereby the coal becomes intermingled with the general mass of property having a situs within the State, and subject to the State's dominion and liable to taxation as such; and the stored coal retains that character and status until it is again shipped in interstate commerce" (R. 270).

The validity of Appellants' contention under this point depends upon the choice between the directly opposite conclusions of the New Jersey Supreme Court and the Court below on the question of the legal status of the coal during the stop-over period of in-transit storage at Coalberg. Appellants believe, and urge, that, under the law and the undisputed facts of this case, the interstate status of the commerce involved did *not* terminate upon the arrival of the coal for in-transit storage at Coalberg, but that that interstate status continued during the stop-over period and until the final delivery of the coal at ultimate destination, in accordance with the original intent of the shipper and the carrier, and in accordance with the terms of the original

shipping contract and the provisions of the applicable, and controlling, tariff.

The conclusion of the Court below entirely disregarded the controlling tariff, and erroneously considered inbound and outbound shipments as separate and unrelated transactions, contrary to the decisions of I. C. C. and the Courts. The conclusion of the Court below was (R. 267):

> "We are clear that the taxes thus levied do not constitute a direct and undue burden upon and therefore a regulation of interstate commerce in contravention of Article I, sec. VIII, cl. 3 of the Federal Constitution."

In holding that the continuity of the interstate movement can only be interrupted by "natural causes or lack of facilities for immediate transportation" (R. 271), the Court below entirely disregarded the established practice of storage-in-transit as a part of interstate commerce within the definition of Section 1 (3) (a) of the Interstate Commerce Act.

It is true, as the Court below observes (R. 268), that while Coalberg was under lease to, and used for their own private purposes by, Pattison & Bowns before the plant was taken over by Erie on February 25, 1939, as, and tariffs were published for, an exclusively in-transit facility and service for interstate shipments of coal, Independent acted as field warehouseman for Pattison & Bowns and other private owners of coal (R. 158), but the testimony clearly, and uncontradictedly, shows that that service was only a private arrangement for "spot storage" to enable a few private owners to finance their coal purchases (R. 155, 158). Prior to February 25, 1939 there were no in-

transit railroad services rendered at Coalberg and no transit tariffs applicable thereto, and none of the coal was under a protected through rate, or through shipping contract. It was all in the possession of private owners after the original interstate transportation and shipping contract had ended, and the carriers had made final delivery of the coal. The warehouseman was not acting as the agent of the carrier, and the carrier was not operating the facilities.

In support of its above stated conclusion the Court below stated that the coal moved out of storage to its ultimate destination on "a new billing" (R. 270).

The fact that "a new billing," or a reshipment, may occur to cover the continuation of the through interstate journey from point of origin to ultimate destination is not determinative of the question of the interstate status of the stored coal, *Baltimore & O. R. Co.* v. *United States,* 24 Fed. Supp. 734, 735, 736; or the fact that the exact ultimate destination in another state may or may not be known at the time of shipment, *Missouri Pac. R. Co.* v. *Schnipper,* 51 Fed. (2d) 749; *Carson Petroleum Co.* v. *Vial,* 279 U. S. 95, 103-104, *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366. It is the original intention of the shippers, of the original shipping contract, and of the tariff covering the shipment, that governs, (Four cases just cited and *Texas* v. *Anderson, Clayton & Co.,* 92 Fed. (2d) 104, 107; Cert. denied 302 U. S. 747, *Baltimore & O. S. W. R. Co.* v. *Settle,* 260 U. S. 166, 171; *Texas & N. O. R. Co.* v. *Sabine Tram Co.,* 227 U. S. 111, 126-127, 130.

In *Baltimore and O. R. Co.* vs. *U. S.,* 24 Fed. Supp. 734, the court considered certain tariffs and rates involving in-

transit provisions for stopovers and services rendered to interstate commerce at Cadosia, N. Y.

The court said (p. 735):

> "A 'transit' is a stop-over privilege granted by a carrier, by which a break de facto in the continuity of carriage of goods is disregarded, and two legs of a journey are treated as though they were covered without interruption. It unites both legs into a 'through route', for which a joint rate can be published. Indeed, while there could be no purpose in allowing a 'transit' without a joint rate, theoretically it would be possible to treat an interrupted carriage as being over a 'through route' by the aid of a 'transit' even when the rates remained a combination of local rates."

* * * * * * *

(p. 736)

> "The reason why such interruptions are held not to break continuity is because of the intent of the parties at the outset to unite all parts of the carriage; and that intent—while not alone conclusive, because no one element is that—is probably the most important single determinant of continuous carriage, and therefore of 'through routes'."

* * * * * *

> "The importance of the publication of a joint rate with 'transit' is that it shows beyond peradventure that the parties do intend so to unite the legs of the journey. The practice antedated the existence of the Commission itself, and has been recognized by it over and over again in instances too numerous to cite. Much of the business of the country is conducted upon the assumption that it is effective to create 'through routes' which would not otherwise

exist, and for the reasons we have just given that result follows on principle."

* * * * * *

"Here it is not material to learn where the methanol is going, but only that it is upon some through route which crosses a boundary of New York. We are therefore free to hold that the 'transit' in this case did create a 'through route', and we think that it did."

No appeal was taken from that decision and it has not been overruled. Other decisions to the same effect, including cases involving precisely the same conditions and practices upon which the Court below based its findings and conclusions above quoted are *North Packing & Prov. Co.* v. *Director General*, 104 I. C. C. 607; *D. A. Stickell & Sons* v. *Pennsylvania R. Co.*, 151 I. C. C. 364; *State of Texas* v. *Anderson, Clayton & Co.*, 92 Fed. (2d) 104, 107, Cert. denied 302 U. S. 747.

In *Gulf, C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403, 412, the Court held that transportation "follows the contract of shipment, until that is changed by the agreement of owner and carrier."

In *Wheelock & Bierd* v. *Akron C. & Y. Ry. Co.*, 179 I. C. C. 517, 520, the entire Commission on rehearing said:

"In *Central R. R. Co.* v. *United States*, 257 U. S. 247, the Supreme Court recognized that transit privileges such as those here before us rest 'upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination.' In *Grand Rapids & I. Ry. Co.* v. *United States*, 212 Fed. 577, the court said

that before the benefits of a transit shipment can be accorded some relation must in fact exist between the proposed outbound shipment and an inbound shipment. Practicable transit, especially on grain, could not exist without according to the shipper the right to bill his shipments to the transit point in the first place and subsequently to rebill them or their equivalent to a new and final destination, for the obvious reason that the final destination is not and can not be known at the time of initial shipment. Transit arrangements represent a departure from ordinary transportation service, under which shippers are accorded a more favorable basis of rates than would obtain if the inbound and outbound movements were treated as separate shipments. *Montgomery Cotton Exchange* v. *L. & N. R. R. Co.*, 112 I. C. C. 325, 329. To treat the inbound and outbound shipments as separate and distinct is hopelessly repugnant to the principle of transit, which is that the same commodity, although generally in changed form, which moves to the transit point shall move therefrom to a new destination, and that the shipment from the point of origin through the transit point to destination is the same in principle as if the shipment had moved without transit. *Columbia Malting Co.* v. *N. Y. C. R. R. Co.*, 53 I. C. C. 137. The underlying theory of transit is that of a continuous transportation from the point of origin to the ultimate destination."

More recently, in *Texas Steel Co.* v. *Missouri-K.-T. R. Co.*, 225 I. C. C. 337, 339, the entire Commission on reargument said:

"Transit has long been recognized as the stopping of a commodity for processing or other purposes, and the forwarding of the same, or an equiva-

lent, under an arrangement which by legal fiction ties the inbound and outbound movements together so as to create what, before the law, is a continuous through movement and not two separate movements. Such transit practices have long been permitted with the approval of this Commission and the courts, not only in the structural-steel industry but also in other important industries, including grain, cotton, and forest products, even though there is always an interruption in the physical continuity of the movement at the transit point and generally the ultimate destination of the commodity is unknown when it leaves the first origin. In the case of most commodities, including structural steel, it is impracticable to preserve the identity of the material in and out of the transit point, and in such instances reasonable and proper substitution has always been the practice."

The breakup made by the Court below in the intended continuity of the interstate status of the coal involved, is unlawful under the tariff and the Interstate Commerce Act. This was squarely decided in *Baltimore & O. S. W. R. R. Co.* v. *Settle*, 260 U. S. 166, where the shipper tried to break the intended through movement into two separate legs of the journey; one interstate and the other intrastate, in order to obtain what happened in that case to be a lower combination of the through and local rates. The essence of that decision, with respect to the conclusion of the Court below that the coal ceased to be interstate commerce upon its arrival at the intermediate transit point of Coalberg, appears in the following quotation from that case;

(p. 171)

"In other words, Madisonville was at all times the destination of the cars; Oakley was to be merely

an intermediate stopping place; and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention, as it was carried out, determined, as matter of law, the essential nature of the movement; and hence, that the movement through to Madisonville was an interstate shipment. For neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk, is an essential of a through interstate shipment. These are common incidents of a through shipment; and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination had at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet the through interstate tariffs apply."

The above quoted conclusion of the Court in *Baltimore & O. S. W. R. R. Co.* v. *Settle*, it is supported by the previous decisions therein cited. It is also in accordance with the exhaustive review of the subject of the interstate status of commodities while stopped for in-transit storage and services, and the numerous decisions of this court cited, in the Commission's decisions in *T. Keery Co. Inc.* v. *New York, O. & W. Ry.*, 206 I. C. C. 585, 588-591 (1935); *Same case*, 211 I. C. C. 451, 452-453 (1935); *same case*, 226 I. C. C. 335, 344-351 (1938), which were sustained in the above mentioned decision in *Baltimore & O. Ry. Co.* v. *U. S.*, 24 Fed. supp. 734.

A similar situation, and a similar decision, is found in *Texas & N. O. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111, from which the following is quoted (pp. 126-127).

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured, and shipped, and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle, and means will be afforded of evading the national control of foreign commerce from points in the interior of a state. There must be transhipment at the seaboard; and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign.

That it is the nature of the traffic, and not its accidents, which determines its character, is illustrated by Railroad Commission *v.* Worthington, *supra* (225 U. S. 101). A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie, for carriage thence by lake vessels. The shipper transported the coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron, and only taken out of the accumulated lots from time to time for the purpose of shipment out of the state. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming

it for its interstate journey. It was held that its transportation to Huron was an interstate carriage.

Much stress was laid in the argument upon the fact that the coal was billed only to Huron. Replying to the contention the court said that the billing of the coal was not necessarily determinative, citing Southern P. Terminal Co. *v.* Interstate Commerce Commission, *supra* (219 U. S. 498)."

(p. 130)

"Nor was there a break, in the sense of the interstate commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transhipment at Sabine. Swift & Co. *v.* United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

The billing of a shipment does not determine the question as to whether such shipment is an interstate or intrastate movement *Northern Pac. Term. Co.* v. *Spokane, P. & S. Ry.*, 79 Fed. (2d) 773.

A transit service is based on the theory that the transport contract has not been completed and the entire shipment from point of origin through the transit point or points to destination is the same in principle as if the shipment had moved through without transit, *Larabee Flour Mills Co.* v. *Chicago B. & Q. R. Co.*, 223 I. C. C. 55, 64.

As transport and low rates from origin to transit points become parts of the interstate journey, interstate charges are in effect when the products are reshipped through

routes and through rates are maintained, and the commission has jurisdiction. *Routing Cottonseed to Kansas and Missouri*, 231 I. C. C. 775, 779.

In *Stanton & Son* v. *Atchison, T. & S. F. R. Co.*, 258 I. C. C. 315 (1944), the Commission held (p. 317):

> "In proceedings where our jurisdiction is in issue, the actual movements and the real character of the shipments are the determining elements. Neither through billing, uninterrupted movement, continuous possession by a carrier, nor unbroken bulk, is an essential of a through shipment. The manner in which the lumber was handled at the port evidences the intention of the shipper that it was destined beyond the port. The transit rule authorizing storage at the port for a period of 12 months provided an effective means for preserving the continuity of these shipments."

In *Grain Proportionals, Ex-barge to Official Territory*, 246 I. C. C. 353 (1941), the Commission held (p. 378):

> "*Interpretation of the transit rules.*—We have consistently applied the principle that transit arrangements rest upon the fiction that the incoming and outgoing transportation services, which are in fact distinct, constitute a continuous shipment of the identical article from point of origin to final destination. *Central P. R. of N. J.* vs. *United States*, 257 U. S. 247. Under transit, there is a movement of a like unit of a particular commodity or its equivalent over a through route at a through rate from point of original shipment to point of ultimate destination".

In *Western Oil Refining Co.* v. *Lipscomb*, 244 U. S. 346, the court set aside a state "occupation or privilege tax"

(p. 347) in a case where the state court, as in the present case, held that the interstate character of the commodity had ceased during a stop-over period, which required a rebilling for the continuance of the transportation. The principles of the cases above cited, and contended for by Appellants in this case, are stated by the Court as follows:

(p. 349):

"On the contrary, it is a case where the shipper intended from the beginning that the transportation should be continued beyond the destination originally indicated, and where there is nothing which requires that decisive effect be given to the bill of lading. Ordinarily the question whether particular commerce is interstate or intrastate is determined by what is actually done, and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one state to another, a rebilling or reshipment en route does not of itself break the continuity of the movement or require that any part be classified differently from the remainder. As this court often has said, it is the essential character of the commerce, not the accident of local or through bills of lading, that is decisive."

* * * * * *

(p. 350)

"Certainly the transportation of the merchandise destined to Mount Pleasant was not completed when it reached Columbia; nor was the continuity of its movement broken by its temporary stop at that place. As to that merchandise the journey to Columbia and the journey from there to Mount Pleasant were not independent, each of the other, but in fact and in legal contemplation were connected parts of a continuing interstate movement to the latter place.

> It results that the tax was imposed for carrying on interstate commerce, and so was repugnant to the Constitution and void."

A part of the conclusion of the Court below was that the coal was stored at Coalberg "for an indefinite period" (R. 270). That statement is incorrect in both fact and law. The word "indefinite" means; "not definite, not defined, not precise, vague, unlimited, indeterminate, uncertain, inexact" (*Cent. Dict. & Encyclopedia*). Diametrically opposite to being "indefinite", the "period" of storage is expressly and *definitely* limited by the controlling tariff and the contract of transportation. Section (d) (p. 3, R. 56) of the tariff (Ex. P-12, R. 56, 110-111) provides a maximum limitation of two years from date of delivery at Coalberg. Exhibit P-17 (R. 60, 90) shows a continual fluctuation in the amount of coal in storage. It comes and goes according to the requirements of the commerce. There is no evidence that any coal ever remained in storage for the full two year period. However, the length of time a given shipment of coal remained in storage, within the two-year limitation, is immaterial in this case.

The Interstate Commerce Act (49 U. S. C. A., Sec. 15, paragraph (1)) confers exclusive original and plenary jurisdiction upon the I. C. C. to regulate and enforce the rates, regulations and practices of the carriers of interstate commerce respecting in-transit facilities and services, *Thompson* v. *Texas Mex. Ry. Co.*, 90 L ed adv op. 886, 894, U. S. In *Storage of Cocoa Beans in New York District*, 231 I. C. C. 575, the Commission approved a tariff provision for a two-year storage period, and the protection of through rates during that period.

It is not disputed that all of the coal arriving at Coalberg for in-transit storage moves by rail in interstate commerce from mines in Pennsylvania, and moves out again by rail, under the original shipping contract and at through, or joint through, rates under this tariff, which applies solely for storage-in-transit purposes at Coalberg. Most of the outbound coal continues as a rail and water movement to New York (R. 112) by way of Edgewater coal docks of the Susquehanna Railroad on the Hudson River (R. 163), where it is dumped into barges and continued to final destination (R. 164). Some of it goes to destinations in the States of Maine and Massachusetts and some to Long Island (New York) (R 163). The yard has had some coal ultimately destined for Bogota and Passaic, in New Jersey (R. 163).

It is immaterial whether some of the coal finds its ultimate destination in New Jersey.

In *United States* v. *Erie R. R. Co.*, 280 U. S. 98, wood pulp was imported to Hoboken, New Jersey, by shipload. Upon arrival the agent of the shipper gave to the terminal company at Hoboken instructions for re-shipment of parts of the cargo; two or three cars at a time, by rail to Garfield, New Jersey, and made out bills of lading, and paid the freight, covering the shipments from Hoboken to Garfield; both in New Jersey.

Although the original shipment was made to Hoboken, the Interstate Commerce Commission ordered Erie and a connecting carrier to establish a through import rate applicable to that movement, on a finding: (p. 101)—

> "that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent

on the part of the shipper that it shall be transported to Garfield."

The carriers contended, and the United States District Court for the District of New Jersey held, on a contest of that order, that the shipments under new local bills of lading from Hoboken to Garfield were intrastate movements.

The decision of the District Court was reversed by this Court, which said:

(pp. 101-102)

"But the nature of the shipment is not dependent upon the question when or to whom the title passes. * * * It is determined by the essential character of the commerce. * * * It is not affected by the fact that the transaction is initiated or completed under a local bill of lading which is wholly intrastate. * * * or by the fact that there may be a detention before or after the shipment on the local bill of lading * * *."

A similar holding appears in *Ohio R. R. Com.* v. *Worthington*, 225 U. S. 101.

In *United States* v. *Union Stock Yard & Transit Company of Chicago* (1921) 226 U. S. 286, 304 in holding that the Chicago Union Stock Yards were engaged in interstate commerce and accordingly subject to I. C. C. regulation, the Court said:

"That the service is performed wholly in one State can make no difference if it is a part of interstate carriage. 'The transportation of live stock,' said this court in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, in treating of the duties of common carriers, irrespective of the Act to Regulate

Commerce, begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee.' In this connection see *Coe* v. *Errol*, 116 U. S. 517; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498.

"The fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system was held in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra*, to make no difference, where the service to be performed was a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that neither the Junction Company nor the Stock Yard Company issues through bills of lading. It is the character of the service rendered, not the manner in which goods are billed, which determines the interstate character of the service." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra; Ohio R. R. Comm.* v. *Worthington*, 225 U. S. 101.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (1911) 219 U. S. 498, it was contended that an I. C. C. order was an attempt to regulate intrastate commerce, in that goods purchased in another state and shipped in interstate commerce to Galveston for export lost their interstate character when, at Galveston, they were processed and manufactured (grinding cottonseed cake). The Court said (pp. 526-7):

"• • • The manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in

> the transshipment of the products in export trade, and their regulation is within the power of the Interstate Commerce Commission. * * * It makes no difference * * * that the shipments of the products were not made on through bills of lading, or whether their initial point was Galveston or some other place in Texas. They were all destined for export, and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol*, 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or been delivered to a carrier for transportation.' "

There is no difference, under the Commerce Clause and the Interstate Commerce Act, between interstate and foreign commerce. Intention has the same relevance and control in either case. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295, 296.

The decision of the Court below was based upon the legal conclusion that the storage business to be licensed was "an independent local service" and, therefore, a local incident separate and distinct from interstate commerce. That was the State's contention, and the conclusion of the State Court, in *Nippert* v. *City of Richmond*, 90 L. ed. Adv. Rep. 496, U. S. , which also involved a municipal ordinance for licensing the privilege of conducting a business. In overruling that contention and reversing that conclusion this Court said:

(p. 500)

"If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse, which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result.

It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affect-

> ing commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce."

One of the supporting cases cited by this Court in *United States* v. *Erie R. R. Co.*, 280 U. S. 98, 101-102, was *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95.

In the *Carson Petroleum* case the same contention was made, and sustained by the state court (p. 10), on a similar factual situation, as above quoted from the opinion of the Court below. The opinion in the *Carson Petroleum* case exhaustively reviewed the cases on both sides of the line of distinction on this question and decided in favor of Appellants' contention on this appeal. The decisions on both sides of the line of distinction on this question were also reviewed in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 174-176. In the latter case the court said that the first line of cases therein considered "makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid" (p. 174). Then follows a specification of the classes of inhibited license, or other, taxes imposed by state or local authorities.

In *Sprout* v. *South Bend*, 277 U. S. 163, the municipal license tax was held invalid as applied to an interstate bus operation. That ordinance, similarly to the ordinance involved in this case, made no distinction between interstate commerce and intrastate commerce (p. 167). The Court held (p. 171):

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account

of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

* * * * * *

"A state is equally inhibited from conditioning its exercise (the right to conduct the business) on the payment of an occupation tax." (Bracketed words supplied.)

(p. 172)

"For the ordinance is void because of the imposition of the license fee."

Obviously, the mere storage of the coal at Coalberg, which the Court below held was not interstate commerce, could not exist as a separate business, independent of the transportation functions of which it is an integral, statutory, and inseparable part. It is equally obvious that Appellants could not discontinue the storage feature without withdrawing also from those transportation incidents, within the doctrine above quoted from *Sprout* v. *South Bend*. The combination of interstate transportation and storage in transit are essential to the commerce covered by the tariff, and could not separately exist under that tariff. No *intrastate* coal, is hauled or stored, and no other business is transacted, at Coalberg.

Coalberg is located at the intersection of the railroads of Erie Company (Bergen County R. R.) and the New York, Susquehanna & Western Railroad Company (Ex. P-1, R.

18A, 64), within convenient access to the Edgewater coal docks of the latter company on Hudson River, where most of the outbound coal is dumped from cars into vessels or barges for final destinations in the New York Harbor area and New England (R. 112, 163). The concentration of a convenient supply of anthracite coal for winter fuel is as indispensable to the welfare, health, commerce, and the economic necessities, of the New York metropolitan area, as a full supply of winter firewood in the woodshed of a Maine farmhouse.

During the past half century the interstate commerce of this country has greatly expanded in the volume, importance and the variety of its services to the public. By successive amendments of the Interstate Commerce Act, Congress has correspondingly enlarged the field and detail of Federal control and regulation.

For the past forty years (since 1906) transit facilities and services, including stop-over privileges for concentration and storage-in-transit have been included within the definition of railroads and transportation (Sec. 1(3)(a)) as integral parts of interstate commerce subject to the provisions of the Interstate Commerce Act and regulation by the Interstate Commerce Commission. It has become a universal, important and necessary adjunct of transportation throughout the country for many commodities.

It is inconsistent with the declared policy of Congress and the Interstate Commerce Act to permit local inhibitions, restrictions, regulations and taxes upon the privilege of conducting these important and essential features of a unified, and uniform, national transportation system. If a local municipal government can isolate, interdict, re-

strict and require municipal permission and taxation as a condition precedent to the right to conduct one integrated service of interstate commerce it may extend its control over others. If one municipality may do so, any number of other municipalities may do likewise, by divergent and conflicting restrictions and exactions. In this manner the unity and uniformity of interstate commerce may be hopelessly disintegrated, and its various elements broken into innumerable fragments; each likewise differently interdicted, restricted, regulated, and taxed within the boundaries of each of the multitude of municipal subdivisions of each of the forty-eight states. In such case through routes, through rates and through tariffs on any commodity would become impossible because interstate traffic would be subject to a multitude of inhibitions, restrictions, regulations and license taxes, each differing from the other according to the whim of the governing body of each municipality.

Complete Federal control, and Interstate Commerce Commission regulation, of interstate commerce would be destroyed. This case presents a direct conflict between Federal law and regulation which requires common carriers to provide these facilities, and a municipal ordinance which positively forbids their operation without first obtaining a municipal license, and the prepayment of a tax, for the privilege. Here, as in *Southern Ry.* v. *Reid*, 222 U. S. 424, 442:

> "What they (the municipality) forbid the carrier to do the (Federal) statute requires him to do, and punishes disobedience by successive daily penalties." (Bracketed words inserted.)

This situation resembles the conflict of state and federal authority presented in *First Iowa Hydro-Electric Co-*

operative v. Federal Power Commission, 90 L. ed. Adv. Op. 855; U. S. , where a state statute forbid, without a state permit, the development of a water power project approved by the Federal Power Commission under authority of an Act of Congress. The Court said (L. ed. p. 860):

> "Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government.
>
> * * * This would subject to State control the very requirements of the project that Congress has placed in the discretion of the Federal Power Commission".

Quoting from another case, the Court said (L. ed. pp. 869-870):

> "'The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. * * *. It is no objection to the terms and to the exertion of the power that "its exercise is attended by the same incidents which attend the exercise of the police power of the states". The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment'.
>
> It is the Federal Power Commission rather than the Iowa Executive Council that under our constitutional Government must pass upon these issues on behalf of the people of Iowa as well as on behalf of all others".

In *Morgan* v. *Virginia*, 90 L. ed. Adv. Op. 982, U. S. , the Court reversed a judgment of the Virginia Su-

preme Court of Appeals which had sustained a state statute challenged on the ground of burdening or regulating interstate commerce.

Appropos of the status of James Thompson as an individual appellant in the present case, the Court held that an individual appellant—

> "* * * is a proper person to challenge the validity of this statute as a burden on commerce. If it is an invalid burden, the conviction under it would fail. The statute affects appellant as well as the transportation company. Constitutional protection against burdens on commerce is for her benefit on a criminal trial for violation of the challenged statute" (L. ed. p. 984);

That case also held:

> "Where uniformity is essential for the functioning of commerce, a state may not interpose local regulation" (L. ed. p. 984);

Obviously, "uniformity" is essential in the regulation of in-transit facilities and services of common carriers generally, and of Erie in particular in the present case, if interstate commerce is to move freely and without conflicting local restrictions. If each municipality along the line of an interstate railroad may lawfully impose its own brand of restrictions and regulations upon such commerce, uniformity would be impossible with respect to any interstate shipment or transportation service.

Unlike the case at bar, where there is an act of Congress expressly governing the in-transit facilities and services involved (49 U. S. C. A. Sec. 1 (3)), there was no act of Congress dealing with the subject involved in *Morgan* v.

Virginia. Nevertheless this Court struck down the state statute in that case on the principle:

> "* * * we must decide the validity of this Virginia statute on the challenge that it interferes with commerce, as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulations for interstate travel" (L. ed. p. 989);

This Court held that the transportation of interstate passengers

> "* * * require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid" (L. ed. p. 989);

In the concurring opinion of Mr. Justice Frankfurter, he says:

> "The imposition upon national systems of transportation of a crazy-quilt of State laws would operate to burden commerce unreasonably, * * *" (L. ed. p. 990);

This principle of uniformity of regulations of interstate commerce as essential to the Federal policy of providing an adequate, economical and efficient transportation service, as well as the additional cost imposed by State regulation, was emphasized in *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 767, 770, 771, 773, 781, 782, 783.

In that case the Court observed (p. 775):

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation" (p. 775).

Likewise, if the Township of Saddle River, may lawfully tax and regulate, interstate transportation facilities and services of the nature here involved, every other municipality may do so, and they need not prescribe the same, or even similar, regulations.

State License Fees.

Another ground upon which the Court below rested its conclusions was that this ordinance imposed a valid "license or privilege tax or excise" (R. 267), because (a) "a tax for the privilege of exercising a corporate franchise within the state is not obnoxious to the commerce clause," (b) "A tax measured by net profits earned within the state is valid, even though these profits may have been derived in part, or indeed mainly, from interstate commerce," and (c) "A franchise is deemed a part of the corporate property lawfully taxable in the state" (R. 268).

These observations are irrelevant to this case. This ordinance does not purport to impose a tax upon the franchise as property, or upon the privilege of exercising a corporate franchise. It does not impose a tax measured by net profits earned within the state. The amount of the tax has no relation to profits, either gross or net, or to the volume of business done, or the value of the privilege of conducting it.

The ordinance in question provides (Sec. 3, R. 10), and the Court below held, that the license fee is imposed "for revenue" (R. 265).

It is enforcible only by fine and imprisonment. The penalties are cumulative at the rate of $200 fine and 90

days in jail for each and every day during which failure to obtain a license continues. (Sec. 7, R. 10-11).

Each of the three courts that have considered this case have treated the license fee simply as a tax, and a considerable portion of the opinion of the Court below is devoted to sustaining the right of the municipality to impose this tax either upon the property, or the corporate franchises, of Appellants. (R. 266-268, 271-273.)

This ordinance provides that Appellants cannot carry on, or work in, their business, at Coalberg unless and until the Township Committee sees fit to grant a license for that purpose, and they prepay an annual license fee which, according to the construction placed upon section 2 of the ordinance by the Township officials charged with, and who assumed, the duty of enforcing the ordinance, amounts to $20,475. The ordinance *interdicts* the continuance of that business as of the date of the adoption of the ordinance, and at the end of each calendar year, until the tax is paid and the license is granted. At any time the license may be revoked and the paid license fee forfeited, for reasons deemed sufficient by the Township Committee, but not specified or indicated in the ordinance.

This ordinance presents what is, under the facts in this case, a positive barrier, within the sole power of the Township to erect, to the conduct of a business for which this property, taxed on a valuation of $133,875.00, is solely adapted.

Regardless of the taxable situs, or taxability, of the coal in storage, or of any corporate franchise, or any property located within the Township, and in addition to all other taxes, this ordinance purports, unmistakably, to im-

pose a license tax or excise upon the *privilege* of conducting an established legitimate business, and of the privilege of any person to be employed therein.

That business consists solely, and exclusively, of transporting, receiving, storing, handling and servicing interstate shipments of coal and reshipping it to an intended ultimate destination, pursuant to provisions of the Interstate Commerce Act and of a special tariff issued and published for that sole purpose, and duly filed with I. C. C. in accordance with the provisions of that Federal act.

Whether, or not, the coal, while in storage, is locally taxable, the *business* of transporting and storing that coal in-transit and shipping it out to an ultimate destination as originally contemplated by the owner, the shipping contract and the tariff, is a business devoted exclusively to interstate commerce. It is, therefore, an interstate business that is being taxed.

The New Jersey Constitution provides:

> "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value" *N. J. Const. Art. 4, Sec. 7, pgf. 12.*

Insofar as the Court below attempts to justify this license fee as a tax upon property in any form, including corporate franchises, the ordinance violates that Constitutional provision. But the Court held that a "tax upon the business of warehousemen", and a tax upon "the storage and warehouse business", for revenue "are outside the constitutional limitations" requiring general laws, uniform rules, or taxation according to true value (R. 267). The right to conduct a legitimate business or to be employed

therein, are fundamental property rights guaranteed by the Federal, if not by the state, Constitution. These rights cannot be capriciously exploited "for revenue", which is the sole and "expressly declared" purpose of this ordinance (R. 10).

These cases are not mere tax avoidance cases. All of the property, equipment and facilities at Coalberg were annually assessed and taxed by the Township of Saddle River. For the year 1943 (in which the ordinance was adopted and these actions arose) all of that physical property was assessed against the Coal Company; land Block 106-D, the "Place or Premises" involved in these actions, at $20,475; improvements thereon at $113,400. Taxes amounting to $7,770.98 were levied and paid thereon. (Ex. P-2, R. 18, 75-76.)

Independent and the Coal Company are foreign corporations authorized to do business in New Jersey. Since 1904, such foreign corporations have been taxed directly, and exclusively, by, and have paid their taxes directly to, the state, for the franchise, or privilege, of doing business in New Jersey, pursuant to general laws (*N. J. P. L. 1904, Ch. 221, p. 384*). At the time of the adoption of the ordinance in question (January 25, 1943) the pertinent sections of the tax laws were as follows:

> *R. S. 54:32A-8* (source, *Ch. 25, N. J. P. L. 1937, p. 45*).
>
> "A tax is hereby imposed upon every foreign corporation organized for pecuniary profit, • • • for the privilege of exercising its franchise in this State or for the privilege of doing business or maintaining an office in this State, which tax shall be

measured by, and paid annually upon and with respect to, that proportion of the total capital stock issued and outstanding as of January first in each year as the gross income from the business done in this State in the same income year bears to the total gross income from its entire business in the income year, * * *"

This statute is not applicable to Railroad Companies (R. S. 54:32A-9), whose franchises are separately and exclusively taxable by the state under statutes later quoted herein.

The above quoted statute remained in effect until it was superseded by Chapter 162, (*N. J. P. L. 1945, p. 563*) which contains the following:

"2. Every domestic or foreign corporation * * * shall pay an annual franchise tax * * *, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. *And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.*" (italics ours)

Section 5 imposes graduated percentage taxes upon net worth, allocated to New Jersey, with a minimum of $50. for foreign corporations.

For nearly a century Erie Railroad Company, (which in fact and law, conducts the business at Coalberg) and its predecessors under a succession of corporate names (New York, Lake Erie & Western Railroad Company, New York

& Erie Railroad Company, Erie Railway Company and Erie Railroad Company), and New York, Susquehanna & Western Railroad Company, and its predecessors, have operated their respective railroads as common carriers engaged in interstate commerce in and through New Jersey under legislative franchies and authority (N. J. P. L. 1853, p. 480; P. L. 1856. p. 42; P. L. 1857, p. 60; P. L. 1860. p. 604; P. L. 1862, p. 206; P. L. 1870. pp. 1166, 1168; P. L. 1871, p. 1250; P. L. 1898, pp. 23, 236; P. L. 1899, p. 82; *Ross* v. *Adams*, 28 N. J. L. 160, 162, same case on appeal, 30 N. J. L. 505, 508; *Black* v. *Delaware & R. C. Co.*, 22 N. J. E. 130, 418; *Erie R. R. Co.* v. *State*, 31 N. J. L. 531; *Jersey City* v. *Erie R. R. Co.*, 84 N. J. L. 761; *Erie R. Co.* v. *Pub. Utilities Comrs.*, 89 N. J. L. 57, 63, 71, *aff.* 254 U. S. 394, 408, and their railroad properties and franchises have been assessed and taxed by the state taxing authorities under the general railroad tax acts since the first one was enacted in 1884 (N. J. P. L. 1903, p. 222; *Rept. on Valuation of Railroads & Canals*, (1911), by Charles Hansel, pp. 29, 227-230; *Central R. Co.* v. *Martin*, 114 N. J. L. 69, 70; *Central R. Co.* v. *Martin* 30 Fed Supp. 41, 42; *Central R. Co.* v. *Martin*, 115 Fed. (2d) 968, 969, cert. denied 313 U. S. 569).

A description of the properties owned or operated by Erie, including those in New Jersey, and Erie's relation thereto, or control therof, appears in *Erie Railroad Reorganization*, 239 I. C. C. 653, 655-660. Since 1884 all railroad property in New Jersey, including the franchises, has been valued and taxed by the state under a separate railroad tax act and, up to 1941, all of the taxes on the franchises belonged to the state, (Chap. 101, N. J. P. L. 1884, pp. 142, 147, Revised, Ch. 208, N. J. P. L. 1888, pp. 269, 274, Ch. 259, N. J. P. L. 1888, p. 376.

When the ordinance in question was adopted (January 25, 1943), and ever since, the railroad tax act (N. J. P. L. 1941, ch. 291, p. 776) (as amended P. L. 1942, c. 337) provided as follows:

R. S. 54:29A-7:

"There is hereby levied an annual property tax upon all property used for railroad purposes at the rate of three percentum (3%) upon true value thereof. The tax hereby imposed shall be assessed by the State Tax Commissioner, in the manner hereinafter provided, for the year one thousand nine hundred and forty-one and for each year thereafter."

R. S. 54:29A-11:

"*Taxes assessed pursuant to this act shall be in lieu of all other State or local taxation of or measured by property taxable hereunder*, other than assessments for benefits." (italics ours)

R. S. 54:29A-13: Franchise Tax:

"An annual excise tax is hereby levied upon all railroads operating within this State for the privilege of exercising their respective franchises, to be computed in the manner hereinafter provided. *This tax shall be in lieu of any other tax or taxes of or upon such franchises*". (italics ours)

R. S. 54:29A-20: Assessment; Franchise Tax.

"On or before July twenty-second in each year, the commissioner shall compute the franchise tax payable under this act and assess the amount thereof to each taxpayer".

R. S. 54:29A-23: "Tax for State use.

All receipts from taxation of property used for railroad purposes other than from assessments of Class II property, as described in section seventeen of this act, together with one-half the receipts from the franchise tax imposed hereunder shall be applied to the uses of the State according to law".

Class II property is defined in the act as follows (R. S. 29A-17):

"The value of the other real estate (other than main stem defined as Class I property) used for railroad purposes in each taxing district in this State, including the roadbed (other than main stem), tracks, buildings, water tanks, riparian rights, docks, wharves and piers, and all other real estate, except lands not used for railroad purposes".

R. S. 54:29A-24: Tax for local use.

"a. The entire amount of tax receipts derived from the assessment of Class II property, as described in section seventeen of this act, and one-half the receipts from the franchise tax imposed hereunder shall be, by the State Comptroller, allotted to and paid over to the local taxing districts in which such property is situated".

For the year 1943 (the year in which this ordinance was adopted), the State Tax Commissioner levied upon the railroads in New Jersey, including Erie, under the above quoted provisions of the railroad tax act, franchise taxes (payable in 1944) in the aggregate sum $9,309,225.23, half of which was allocated to the municipalities, including the Township of Saddle River, on the proportionate formula

prescribed by the statute. (*Thirteenth Annual Report of the State Tax Department* to the Governor and Legislature of New Jersey, 1944 (pp. 3, 11, 19), officially published pursuant to law (*R. S. 54:1-13*). The report for 1944 taxes, payable in 1945 has not yet been published.

From the foregoing statutes of New Jersey it conclusively appears that:

(a) The Township of Saddle River has no power to impose a local excise or franchise tax upon any of these corporate appellants for the privilege of exercising their respective franchises, or doing business, within that municipality, since that power has been preempted by, and reserved to, the State.

(b) As respects all of the corporate appellants, the ordinance in question, as construed by the Court below, attempts to impose, without legislative authority, a duplicate (second) franchise tax, in addition to that already imposed and collected by the State.

(c) As respects Erie, under that ordinance as construed by the Court below, the Township of Saddle River attempts to collect a duplicate tax upon the same franchise and privilege in addition to that which has already been assessed and collected by the State and of which the Township of Saddle River has since 1941, already been paid its statutory proportion.

(d) The conclusions of the Court below that the tax imposed by the ordinance was a valid "license or privilege tax or excise levied for both revenue and regulation under the police power" (R. 266) totally disregards, and is

contrary to, the express, plain and unambiguous provisions of the statutes above quoted, and contrary to the historical theory, and practice, of corporate franchise tax legislation in New Jersey applicable to foreign corporations, authorized to do business in New Jersey, like Independent and the Coal Company, since 1904 (Ch. 221, P. L. 1904, p. 384), and, as applicable to Erie, since 1884 (ch. 101, P. L. 1884, pp. 142, 146).

The taxable status of the coal has nothing to do with this case. Under the laws of New Jersey, none of it was taxable against any of these appellants because they were not the owners of any of it. As against the owners of the coal in storage, it was exempt from taxation under the state statute. *Pattison & Bowns* v. *Township of Saddle River,* 129 N. J. L. 135, affirmed (by the Court below), 130 N. J. L. 177. This ordinance was adopted solely for the avowed purpose of imposing *upon appellants* a tax in substitution for the taxes which the Township tried unsuccessfully to levy against the *owners* of the coal. *Independent Warehouses, Inc.* v. *Saddle River,* 52 Fed. Supp. 96, 96-97; *Independent Warehouses, Inc.* v. *Saddle River,* 132 N. J. L. 390, 392. Hence, the corporate appellants are already regularly taxed for all forms of property, including franchises, which are taxable under the laws of New Jersey.

In *Adams Express Co.* v. *Kentucky,* 166 U. S. 171, at page 181, this court expressed its concurrence in a decision of the Kentucky Court of Appeals (in *Levi* v. *Louisville,* 97 Ky. 394; 28 L. R. A. 480), which held:

> "* * * that a license tax which is not a property tax cannot be substituted for an *ad valorem* tax upon personal property engaged in commercial pursuits * * *."

A license fee imposed, by, or under, state law, as a condition precedent to the right or privilege of conducting an interstate business, or facility, whether under the power to tax for revenue, or under the police power if it exceeds the cost of inspection or supervision, imposes a regulation of, and burden upon, interstate commerce, in violation of the Commerce clause and the Interstate Commerce Act.

In *Simpson-Crawford Co.* v. *Atlantic Highlands*, 158 Fed. 372, 374, the municipal ordinance licensed vehicles for purposes of revenue. The court said: "There is nothing in the ordinance indicating, on the part of the * * * borough * * * a purpose to exercise a mere police power for the protection of the inhabitants of the borough. The fee imposed is an *arbitrary sum*, and its payment is exacted as a condition precedent to the right to transact business in the borough. It is evidently a revenue ordinance." As to the company "it is a tax on interstate commerce." While it is true that the fee is imposed on all vehicles, as was said in *Robbins* v. *Shelby Taxing Dist.*, 120 U. S. 489; "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state" (p. 497).

See also, *Furst* v. *Brewster*, 282 U. S. 492, 497-8; *Ingels* v. *Morf*, 300 U. S. 290, 294, 295, 296, 297; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645, 648; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58; *Sault St. Marie* v. *International Transit Co.*, 234 U. S. 333, 340-1.

Postal Telgr. Cable Co. v. *Adams*, 155 U. S. 688, involved the question of an alleged undue regulation of, and burden upon, interstate commerce, in the form of taxes

imposed by the State of Mississippi for the privilege of conducting business within that state.

The state statute provided, and the state court held, that such taxes were in lieu of all other state, county and municipal taxes (p. 697). The commuted license tax amounted to $391.28 per year, in lieu of *ad valorem* taxes that would have amounted to $1,188.56 per year for state and county purposes, alone, and a larger amount if municipal taxes were added (p. 689).

The following are pertinent extracts from the opinion:

(p. 696)

> "It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained. But property in a state belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax imposed on the corporation on account of its property within a state, and may take the form of a tax for the privilege of exercising its franchises within the state, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the state (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes."

* * * * * *

(pp. 696-7)

"Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The state tax was sustained because the Court found that it was—

(p. 698)

• • • "a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*.' The taxation was neither arbitrary nor discriminating, nor, so far as we are advised, was payment made a condition precedent to doing business, but collection was enforceable by suit and the remedies pertaining thereto, and not otherwise."

• • • • • • • • •

(p. 700)

"In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature

should not be allowed to control construction in arriving at the true intention and effect of state legislation. We are of opinion that it was within the power of the state to levy a charge upon this company in the form of a franchise tax but arrived at with reference to the value of its property within the state and in lieu of all other taxes, and that the exercise of that power by this statute, as expounded by the highest judicial tribunal of the state in the language we have quoted, did not amount to a regulation of interstate commerce or put an unconstitutional restraint thereon."

Five cases are cited (pp. 698-699) in support of the above quoted principles. Subsequent decisions to the same effect are *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 342; *St. Louis S. W. R. Co.* v. *Arkansas*, 235 U. S. 350, 364-5; and *Northwestern Mut. L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132, 134, 138, which is one of the cases cited by the Court below in support of its conclusion.

Another pronouncement against the validity of an ordinance of this sort appears in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 113, which involved a municipal ordinance for revenue.

In *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338, the case involved a New Jersey franchise tax on the privilege of using the public streets for interstate and intrastate telephone business. The court said (p. 346):

"It is elementary that a state may tax property used to carry on interstate commerce. But, as the Constitution vests exclusively in the Congress power to regulate interstate and foreign commerce, a state may not tax, burden or interfere with such com-

merce or * * * *impose a license fee* or other burden *upon the occupation or the privilege of carrying on* such commerce, *whatever may be the instrumentalities* or means employed to that end (citing cases). This tax cannot be sustained if it is not upon the property, but is in fact a tax upon appellant's gross receipts * * * or a license fee to be computed thereon." (Italics ours.)

(p. 347)

"* * * the law cannot be sustained if it operates to burden or regulate interstate business." (Citing cases.)

(p. 349)

"We think it very plain that the exaction is not a tax on property nor in substitution for or in lieu of a property tax. Within the rule heretofore applied in this court the exaction is a direct tax on gross receipts derived from appellant's interstate commerce and, as to that part at least, is void." (Citing numerous cases.)

The above cases hold that excise taxes, or license fees, imposed upon the privilege of doing interstate business have been sustained *only* (a) if such taxes, or fees, are imposed in lieu of all taxes upon the property; (b) if they do not exceed a sum which might be leviable as taxes upon the property itself; (c) if payment is not made a condition precedent to the right to carry on the business; *and* (d) if the enforcement of payment is left to the ordinary means devised for the collection of taxes.

The ordinance, and license tax, here involved violates all four of those conjunctive conditions.

Cases Cited by Court Below.

The cases cited by the Court below in support of its conclusion that the coal had lost its interstate status when it was unloaded for storage at Coalberg are all tax cases. Not one of them involved a *storage-in-transit, or any other transit privilege, or transportation facility or service, under section 1(3) (a) of, or tariffs duly filed in accordance with, the Interstate Commerce Act.* They all involved commodities in the private possession of the owners thereof, that had completed, or not yet begun, any interstate transportation under tariff rates or regulations. The purposes for which the commodities were at rest in those cases had nothing to do with their transportation in interstate commerce.

None of the numerous cases specifically dealing with the interstate aspects of storage-in-transit, and none of the pertinent provisions of the Interstate Commerce Act, cited in the briefs or arguments of Appellants in the Court below, was mentioned, or referred to, in its opinion.

An examination of the cases cited by the Court below, on this point show that they are all inapposite except in the respects hereinafter noted, or are distinguishable in one or more respects, except *State etc.* v. *Engle*, 34 N. J. L. 425 and *Lehigh & W. Coal Co.* v. *Carrigan*, 39 N. J. L. 35 which hold opposite to the conclusion of the Court below, on the very point for which they were cited in its opinion. In fact, the *Carrigan* case was cited for the opposite conclusion in *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95, 102.

For these reasons, space will not be taken to discuss those cases, except for the following pertinent observations

respecting some of them which support Appellants' contentions in this case.

In *Kelley* v. *Rhoads*, 188 U. S. 1, this Court said:

(p. 7)

"The question turns upon the purpose for which the sheep were driven into the state. * * * But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce * * *."

(p. 8)

"Bearing in mind that the weight of all of the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination the facts of this case fail completely to bring it within those authorities."

The undisputed evidence in the present case, as found by the State Supreme Court (R. 254-256) and as recited by the Court below (R. 268-271), shows that the purpose for which the coal was brought to Coalberg was solely for storage-in-transit and later continuance under the initial shipping contract, to its ultimate market at some other destination. The limitation of delay in storage is not "indefinite", but is expressly prescribed by the controlling tariff and shipping contract. Its interstate journey had already commenced. It was not held for sale or delivery at Coalberg, since that is not an intended, or even possible, market for the coal.

The case of *Kelley* v. *Rhoads* was decided in 1903, three years before the Hepburn Act (1906) constituted storage

and kindred services a part of interstate transportation and placed them within the exclusive jurisdiction of the I. C. C.

In *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, the Court sustained a state tax upon the state-earned proportion of the entire net income. The important distinction between that case and the present is shown by the following statement in the opinion (p. 119):

> "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business. * * * Its enforcement is left to the ordinary means of collecting taxes * * * (citing cases). The statute is, therefore, not open to the objection that it compels the company to pay for the privileges of engaging in interstate commerce."

In the present case the license and the prepayment of the tax are conditions precedent to the right to conduct, or be employed in, the business and the only enforcement is by fine or imprisonment, or both, with cumulative daily penalties.

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, the court cited, and quoted, (pp. 326-327) from *Postal T. C. Co.* v. *Adams*, 155 U. S. 688, 695, 696 later cited herein, and (pp. 327-328) from *Philadelphia S. & M. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 345. The quotations from both cases support Appellants' present contentions as to the invalidity of the license tax involved in this case.

In *Northwestern Mut. L. Ins. Co.* v. *Wisconsin*, 247 U. S. 132, the court sustained state "taxes or license fees" levied upon a domestic corporation for the privilege of doing business. The tax involved was a commutation tax

"in lieu of all taxes for any purpose authorized by the laws of this state", except upon real estate. The grounds of this court's decision are stated at pages 137 and 138 of the opinion. Its conclusion (p. 138) was that the tax was valid because:

> "* * * its amount not being in excess of what would be legitimate as an ordinary tax on the property taken at its value."

It held (p. 138) that the tax was not a burden on interstate commerce

> "* * * since the gross receipts coming from that character of business are used only as a measure of the value of the property and franchise lawfully taxable in the state."

In *McGoldrick* v. *Berwind-White Coal M. Co.*, 309 U. S. 33, the court sustained a local sales tax on coal sold after the interstate transportation had ended and delivery had been made by the carrier to the consignee. The Court said (p. 58):

> "Here the tax is conditioned upon a local activity delivery of goods within the state upon their purchase for consumption."

The opinion reviews the cases on both sides of the question but does not overrule any of the cases cited in this brief. That decision was distinguished, on the merits of the present case, in *Nippert* v. *Richmond*, 90 L. ed. Adv. Rep. 496, U. S.

In *McCall* v. *California*, 136 U. S. 104, cited by the Court below (R. 267), the Court considered the conviction of, and

a fine of $20.00 imposed upon, a railroad agent of an off-line agency in San Francisco of New York, Lake Erie & Western Railroad Company, predecessor of Erie Railroad Company.

The Court, in reversing the conviction, held (p. 109) that the solicitation of passenger traffic by that agency was interstate commerce "as much so as is the carrying of freight," and that:

> "The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the '*means*' by which the company sought to increase and doubtless did increase its interstate passenger traffic * * *. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple."

The Court overruled the contentions (a) that the business of the soliciting office was only remotely connected with the business of the railroad company because the railroad ran only between Chicago and New York, (b) that the license tax involved could not directly affect the commerce of the road, and (c) that the business of the San Francisco agency was not essential to such commerce. On these contentions, the Court held "that the essentiality of the business of the plaintiff-in-error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce," and that, if the business of the San Francisco agency was a part of the commerce of the road, or if it assisted, or was carried on with the purpose to assist, in increasing the amount of

traffic on the road, "the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent" (p. 111). In that case the Court quoted, with approval, from *Sherlock* v. *Alling*, 93 U. S. 99, 102, 103, the following (p. 114):

> "'* * * it will be found that the legislation adjudged invalid imposed a tax upon some *instrument* of subject of commerce, or *exacted a license fee from parties engaged in commercial pursuits*, * * *. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on' ". (italics in original.)

The *McCall* case is particularly pertinent to the case at bar because (a) the in-transit storage facilities at Coalberg were maintained by Erie as a "means" of increasing the volume and revenues of its interstate commerce; and (b), in the present case the Court below sustained the conviction of an employee because his employer failed to obtain a license. His functions as manager of the warehousing service was similar to that of McCall as agent of the carrier in San Francisco.

On the same day the opinion in *McCall* v. *California* was read, the court also decided the case of *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S. 114, involving a state licensing statute. The Court incorporated the *McCall* decision by reference (p. 118) as authority for the declaration——

> "• • • that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits."

Emphasis was again placed upon attempts to license "an instrument" of interstate commerce (p. 119, 120).

In the *Norfolk & Western* case the license tax was imposed for the privilege, and as a condition precedent to the right, of maintaining an office in Pennsylvania. In that case, as in the present case, the parties had complied with another statute requiring a certificate from the Secretary of the Commonwealth entitling it to maintain an office (transact business) therein (p. 120).

The Court held (p. 120):

> "*That office was maintained because of the necessities of the interstate business of the Company, and for no other purpose.* A tax upon it was therefore a tax upon one of the means or instrumentalities of the Company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States." (Italics ours.)

The above italicized sentence applies to the Coalberg storage facility.

II.

The license fee prescribed by the ordinance is arbitrary, unreasonable, discriminatory and prohibitory, and deprives appellants, and each of them, of their property without due process of law; denies to them equal protection of laws; and denies to them their privileges and immunities as citizens of the United States, in violation of the fourteenth amendment of the Constitution of the United States.

(Assignment of Errors, pgf. 3 (R. 283-285); Statement of Points, pgf. III, (R. 288).)

In this case in the United States District Court, for the District of New Jersey (*Independent Warehouses, Inc. v. Township of Saddle River,* 52 Fed. Supp. 96) the District Judge found:

(pp. 96-97)

"Originally the Township of Saddle River, within the confines of which the storage site was situated, had taxed the coal stored there as personal property under the tax laws of New Jersey. In 1925 by virtue of an act of the Legislature of New Jersey, Chapter 221, Laws of 1925, R. S. 54:4-3.20, N. J. S. A., personal property stored in a warehouse of one engaged in the business of storage for hire was made exempt from such tax. This Act was held constitutional by the New Jersey Court of Errors and Appeals, 130 N. J. L. 177, 32 A. 2d 363, in a per curiam opinion affirming the opinion of Justice Colie in the New Jersey Supreme Court in the case of Pattison & Bowns, Inc. *v.* Township of Saddle River et al., 129

N. J. L. 135, 28 A. 2d 485. Thereafter, in an attempt to secure revenue lost by virtue of its inability to impose such a personal tax, the Township by ordinance imposed an annual license fee on all persons conducting the business of storage for hire in a warehouse, such fee to be computed on the basis of a certain rate per square foot, a device which would return to the Township in the particular situation under consideration an amount approximately equal to the personal tax assessed before the test of the above mentioned act of the Legislature.".

The New Jersey Supreme Court found (R. 255):

"The controversy between these parties is over the right of the municipality to levy taxes on this coal. This yard is operated as a warehouse, and the taxation of the coal was set aside by this court and our opinion was affirmed by the Court of Errors and Appeals in *Pattison & Bowns, Inc.*, v. *Saddle River Township*, in 129 N. J. L. 135, aff'd. 130 Id. 177. It was there held that coal stored in fenced in piles on an otherwise open tract of land equipped with machinery to handle the same is within the purview of R. S. 54:4-3.20 (exempting from taxation goods stored in warehouse).

The attempt was then made to accomplish the same result by the adoption of the ordinance under which the prosecutors were convicted." • • •

"The prosecutors raise many questions in their attack on the legality of this ordinance, the principal ones being that the coal in reality is being taxed by the license fees, whereas it is exempt from taxation, because it is in warehouse as held by the *Pattison & Bowns case, supra;* also it is exempt from taxation because of its character as interstate commerce, also because of an unreasonable, arbitrary,

capricious and discriminatory exercise of the licensing power.

"We think these arguments are well made and that the ordinance is invalid." (R. 256).

Those two courts have agreed that the proposed license fee is, in effect, a tax imposed by the Township of Saddle River in an intentional "attempt to secure revenue lost by virtue of its inability to impose such a personal tax on the coal".

The *Pattison & Bowns* case involved a Township assessment upon the coal in storage at Coalberg, and taxes levied thereon of $11,325.60 for 1940 and $11,151.36 for 1941.

Because this ordinance imposes a revenue tax measured by land area of the "place or premises" in or at which the business is conducted, it, in effect is a tax upon that land. *Thompson* v. *Kreutzer*, 112 Miss. 165, 72 So. 891.

The "place or premises" involved is owned by, and assessed against, the Pennsylvania Coal Company, and the taxes levied thereon, together with all improvements, have been regularly paid by it (Ex. P-2, R. 18, 76). Independent owns no taxable property in the Township.

The Court below attempted to justify the amount of this annual license fee by the observation (R. 273):

> "From 1903 to 1940, when tax exemption was claimed * * * the plant was successfully managed notwithstanding that property taxes were paid on the stored coal in an amount not less than the current license tax."

That observation involves the following errors;

(a) The tax on the coal was levied against, and paid by, the *owners* thereof in private storage. It was not levied against, or paid by, any of the Appellants, and it imposed no financial burden upon the "plant" or its management, which was then in private operation (R. 85).

(b) The tax revenue formerly derived from assessments on the coal is, by this ordinance, sought to be shifted to Independent and therefore to Erie which, since February 25, 1939, has in effect, operated the plant and been obligated to pay all lawful taxes on the plant, its operation, and the business conducted there.

(d) The amount of the annual license tax, as the ordinance has been construed, and administered in the complaint against, and the conviction of, Independent and James Thompson, would amount to $20,475; or nearly twice the amount of the former annual taxes on the coal. That license fee represents the equivalent of $1.50 per ton on all coal put in storage in 1943 (R. 87).

The amount of the annual license fee being *fixed*, according to the ground area of the plant, the rate per ton of coal stored would increase in the inverse ratio of the quantity of coal in storage, which has been decimated since 1941 (Ex. P-10, R. 49, 87; Ex. P-17, R. 60, 90). The gross revenue derived from the storage facilities and services is 28 cents per ton.

It is a self-evident proposition that, if this license fee must be paid, it must be borne by Erie out of revenues derived from the transportation of the coal in interstate commerce, or imposed on shippers as an additional cost of

their interstate commerce. In either event it becomes a direct burden upon such interstate commerce.

Neither recourse is feasible because the tariff rates on the transportation of the coal were fixed by I. C. C. (R. 114), *Alden Coal Co.* v. *Central R. Co. of N. J.*, 263 I. C. C. 639, (affirmed by a 3-Judge U. S. District Court, Dist. of N. J. July 12, 1946 in *Gardner, Trustee,* v. *United States,* not yet reported). Those rates, and the rates for the storage services, are uniform on all competing carriers, (R. 109-111, 112-114). The result would be either a diversion of the traffic to competing carriers who provide such facilities (R. 113) and a resulting diminution of Erie revenues, or the creation of a discrimination against shippers of coal over Erie and connecting carriers.

In *Philadelphia & R. Co.* v. *Pennsylvania*, 82 U. S. 232, a tax on the privilege of conducting business was measured by the rate per ton upon all commodities carried by railroad.

The question was whether the tax imposed a burden upon interstate commerce.

The court concluded that it was impossible to escape the conviction that the burden of the tax rested on the freight transported, or upon the consignor or consignee thereof (p. 274). The Court said:

> "Beyond all question, the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself" (p. 275).

* * * * * *

"The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible" (p. 276).

"* * * the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must, therefore, be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the state—a burden upon interstate intercourse" (pp. 278-9).

* * * * * *

"Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter, because of such transportation" (pp. 281-2).

That decision is cited, and the substance of the above quotations therefrom, is repeated in *Helson* v. *Kentucky*, 279 U. S. 245, 248-249, 250. See also *Adams Expr. Co.* v. *Ohio State Auditor*, 166 U. S. 186, 218; *Galveston H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 227; *Meyer* v. *Wells, F. & Co.*, 223 U. S. 298; *Kansas City, F. S. & M. R. Co.* v. *Botkin*, 240 U. S. 227, 231.

The above quoted findings, in the present case, of the District Court and the New Jersey Supreme Court, and other matters above set forth, show that this ordinance was not a *bona fide* revenue measure, but was an arbitrary, and discriminatory device to circumvent a statutory tax exemption on the coal, and to exact from Appellants or some of them, a tax in substitution therefor, and in addition to all other lawful taxes.

While this ordinance purports to be general in its application, it was enacted for sole application to the Coalberg business for the sole purpose above found by the District Court and the New Jersey Supreme Court. There was no other business of storing goods for hire in the Township (R. 125).

Ordinances adopted with a similar motive are reviewed *In re Wo Lee*, 26 Fed. 471, and *Yick Wo* v. *Hopkins*, 118 U. S. 356. At page 371 of the *Hopkins* case there is a discussion of the case of *Ohio* v. *Cincinnati G. L. & C. Co.*, 18 Ohio 262, 300, where an ordinance purporting to fix the price of gas, under authority of law giving power to do so, was held bad, as passed in bad faith and fixing an unreasonable price for the fraudulent purpose of compelling the gas company to submit to an unfair appraisement of its works.

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 137, the Court held that an abuse of lawful authority was an unlawful exercise of authority.

The Constitution of the United States provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any State deprive any person of * * * property, without due process of law; * * *." (Amend. XIV)

(a) The ordinance is arbitrary.

The ordinance is arbitrary in that it provides an annual license fee, measured by the anomalous method of ¾ of a cent per square foot of total area of the place and premises in or at which the business is conducted, without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operation, but equal, if applied to the place or premises designated in the complaint (R. 5) and conviction (R. 7) to the entire assessed valuation of the land where the inhibited business is alleged to have been conducted (Ex. P-1, R. 18A, 64; P-2, R. 18, 76, 86-87).

Admitting that this was an "interstate business" the Court below held (R. 272-273):

> "And we perceive no force to the contention that the license fee is arbitrary, unreasonable and prohibitory, and repugnant to Federal and State constitutional guaranties, in that (1) the license fee is measured on a square foot basis 'without relation to volume of business conducted, tons of coal in storage, or gross or net earnings of the operations' (2) the fee is fixed 'without relation to the value of the privilege of conducting the business,' and is exorbitant; and (3) the fee is in *quantum* such as will 'prevent the conduct of this interstate business within the municipality'."

Thirty-six other kinds of businesses are licensed under ordinances of the Township (Ex. P-13 R. 50, 133) all of

such businesses are licensed on the basis of flat annual fees ranging from one dollar per unit up to five hundred dollars per unit, without reference to area occupied. The total receipts of the Township for all license fees in 1943 was $4,374 (R. 189, 193-194). Coal yards require no license, yet the Coalberg coal yard is arbitrarily singled out as the only business licensed (R. 194), and, as above shown, that device was used for a special and single purpose of recouping lost taxes unlawfully imposed upon coal stored on this specific property. The resulting license fee may be $20,475 per year according to the construction of the ordinances in the complaints and convictions and depending upon the whim of the Township officers. This discriminatory treatment of the Coalberg plant is purely arbitrary.

Coal is stored in the open and requires large land areas for that purpose, owing to the natural spread of piles. Many other commodities are generally stored in multiple-storied buildings. A ten-story warehouse with the same total floor area, would, under this ordinance, pay an annual fee of ¾ cents per square foot for the ground area of the first floor, only (one-tenth of the license fee for Coalberg), yet such a building might do as much, or more, business. This method of computing the license fee is purely arbitrary.

The Court below cited *Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17, as authority for what it called a "familiar legislative practice" of "A tax on a public warehouse graduated according to storage capacity" (R. 273). In that case the tax had nothing to do with "storage capacity." It was "graduated according to the number of bales of cotton

compressed per annum" (p. 18), which is definitely a basis of volume of business done.

The business of storing goods for hire is not licensed elsewhere in New Jersey under any ordinance or statute, except that the cold storage warehouses for perishable goods are licensed by the State at an annual license fee of $10. for inspection and regulation by the State Health Department (R. S. 24:9-3).

(b) The ordinance is unreasonable.

At the outset, a few comparisons of annual license fees, imposed by New Jersey state laws, and ordinances of Saddle River Township, will illustrate this point:

Liquor Warehouses (R. S. 33:1-14)	$ 100.
Bonded Liquor Warehouses (R. S. 33: 1-10 (5)	500.
Cold Storage Warehouses (R. S. 24:9-3)	10.
Rendering Plants (Ex. P-14, R. 52)	150.
Health License (R. 187)	350.
Live Poultry Dealers (Ex. P-13, R. 51)	25.
Carnivals (Ex. P-13, R. 50)	500.
Motion Picture Houses (Ex. P-13, R. 51)	50.
Junk Yards (Ex. P-13, R. 51)	25.
Retail liquor licenses (R. 186)	250.

All of these items are enterprises involving more or less danger to public health, welfare and morals and which have nuisance aspects requiring special police, fire or health supervision. The Coalberg plant has none of these characteristics, but is in the same class as other unlicensed coal yards (R. 139).

The reasonableness of a license fee is usually measured by the cost of administering the ordinance if it is a police power measure, or by the value of the privilege conferred by licenses for revenue if within the power of the municipality to grant.

This license fee is fixed without relation to the value of the privilege of conducting the business, the volume of business done, the tonnage stored, or the gross or net revenue thereof. The ordinance interdicts the conduct of this business without the prepayment of an unreasonable, and exorbitant, annual license fee.

The annual gross receipts of Independent Warehouse, Inc., from its business at the coal storage plant were as follows: for fiscal years from June to May as the warehouse company's accounts are kept (R. 137):

1939-40	$937.27
1940-41	500.00
1941-42	500.00
1942-43	500.00
1943-44	500.00

The excess over $600. for 1939 (R. 242), represents fees for warehouse receipts collected by Independent from owners of stored coal in excess of prescribed minimum of guaranteed compensation under the above mentioned agreements.

The total over-all gross collections, the operating expenses, and the net financial result, of the plant operation are shown in the record as follows (Ex. P-10, R. 49, 87).

	1941	1942	1943
Receipts	$26,035.02	$18,342.82	$14,422.66
Expenses	33,674.04	36,720.20	45,158.25
Net *deficit*	$ 7,639.92	$18,377.32	$30,735.59

These deficits are met out of the line-haul revenue from the shipments.

The uncontradicted evidence shows that the license fee is prohibitive (R. 138-140) as to the business done by the Warehouse Company and also as to the use of the storage plant for the in-transit storage of coal under the railroad tariffs. The warehouse company could not increase its charge for public warehouse services because of the competitive character of its business (R. 136), or without permission of the Federal Office of Price Administration (R. 139), and any increase in the tariff charges under which the coal is stored at the plant is subject to approval of the Interstate Commerce Commission, and the loss of competitive status of Erie and participating carriers with relation to other coal carrying railroads (R. 112, 114, 124).

Although the license fee is "expressly declared to be imposed for revenue", it is not in lieu of any lawful property tax because, under the laws of New Jersey, the coal in storage is personal property exempt from taxation and all other taxable property at said plant is already assessed and taxed in the full measure of the requirements of all state laws (Ex. P-2, R. 18, 76).

The license fee is, in fact, an excise tax levied upon the privilege of conducting a business, which in this case is an exclusively interstate business. It is not an exaction to

defray the expenses of regulation or inspection of a business affecting the public health, welfare or safety of the community.

There are two separate and distinct classes of ordinances licensing businesses; those adopted in the exercise of the police power, and those adopted for revenue.

In so far as the federal constitution is concerned, it makes no difference whether the license ordinance is for regulation under the police power, or for revenue. *Murdock* v. *Pennsylvania*, 319 U. S. 105, 139.

On this aspect of the Ordinance, the New Jersey Supreme Court held:

> "The prosecutors were engaged in a legitimate business, and it seems to us that the enactment of this ordinance was not a reasonable exercise of the police power for the promotion of public health, safety or general welfare but was an arbitrary attempt to raise revenue by discriminating against the business of prosecutors in the guise of license fees, and to thus secure from it a sum equivalent to taxes which would accrue, were the property not exempt." (R. 256).

The Court below stated that the ordinance was "admittedly a revenue measure" (R. 265). It also stated that it involved "a license or privilege tax or excise levied for both revenue and regulation" (R. 266). In that respect the Court referred to certain parts of the ordinance:

Section 4 (R. 10) provides:

> "If perishable goods are stored at said licensed premises, said place or premises and the manner and conduct of said business shall in all respects

comply with any and all health regulations required by any Federal, State or Municipal health authority."

This section is meaningless:

(a) There are no storage places for perishable goods in the Township.

(b) No perishable goods have ever been stored at Coalberg, and it has no facilities for that purpose.

(c) The ordinance is impotent to secure the enforcement of Federal or State health regulations, since applicable Federal and State laws contain their own means of enforcement.

(d) The municipality has no authority to regulate the storage of perishable goods because the State Department of Health has exclusive jurisdiction, under the State laws, to license and regulate every storage warehouse where perishable food is stored within the state *(Chapter 9, Title 24, N. J. Revised Statutes)*.

Section 5 (R. 10) required compliance with all Township police and fire regulations (which, of course, apply to all property or business generally), and this ordinance neither specifies nor prescribes any such regulations. Section 6 (R. 10) provides for police, fire and health inspection, and police reports on the storage of inflammable or combustible matter. This, again, is a provision already contained in general municipal regulations.

The ordinance states that the license fee thereby imposed "is hereby expressly declared to be imposed for revenue" (Sec. 3, R. 10). The Court below stated that the ordi-

nance "levies, admittedly as a revenue measure, an 'annual fee' ", and that the ordinance was enacted in purported exercise of the power conferred by *R. S. 40:52-1(g)* and *40:52-2*" (R. 265, 266). Those two sections, relating exclusively to licensing ordinances, provide:

> *R. S. 40:52-1:* "The governing body may make, amend, repeal and enforce ordinances to license and regulate:
>
> * * * * * * *
>
> g. Lumber and coal yards, * * *, and all other kinds of business conducted in the municipality * * *, and the places and premises in or at which the business is conducted and carried on; * * *"
>
> *R. S. 40:52-2:* "The governing body may fix the fees for all such licenses, which may be imposed for revenue, and may prohibit all unlicensed persons and places and vehicles, businesses and occupations from acting, being used, conducted or carried on; impose penalties for violation of ordinances providing for licenses, and revoke any license for sufficient cause after notice and hearing".

Notwithstanding the above "expressly declared" purpose of the ordinance to impose a license fee only "for revenue" (Sec. 3, R. 10), and the affirmance of the Court below that the challenged ordinance "levies, admittedly as a revenue measure, an 'annual fee' ", the Court below held that the sections above quoted "involves a license or privilege tax or excise levied for both revenue and regulation under the police power" (R. 266). The last quoted statement is the only reference in the opinion to the "police power".

Respecting similar attempts to sustain state or municipal interference with, or regulations of, interstate commerce by an injection of "police power", this Court has repeatedly said:

> "The decisions also show that a state cannot avoid the operation of this rule (the exclusive control of Congress) by simply invoking the convenient apologetics of the police power."

Kansas City S. R. Co. v. *Kaw Valley Drainage Dist.*, 233 U. S. 75, 79; *Southern Pac. Co.* v. *Arizona*, 325 U. S. 761, 779-780; *Morgan* v. *Virginia*, 90 L. ed. Adv. op. 982, 986; U. S.

In the last mentioned case (L. ed. Adv. Op. p. 984; the Court held:

> "* * * if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it."

There is no pretense in this case that this ordinance was enacted as an exercise of the police power. It plainly states that the license fee is "hereby expressly declared to be imposed for revenue" (Sec. 3, R. 10) and the record conclusively supports that stated object.

A coal yard, or coal business, is not a nuisance *per se*, subject to police power regulation, *46 C. J.* page 697, S. 128.

Ordinances, enacted in the exercise of the police power, are authorized by section R. S. 40:48-2, which is an entirely separate and distinct chapter of the New Jersey laws from the statute authorizing licenses for revenue. (R. S. 40:52-1).

Ordinances under the police power are authorized, as the municipality "may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this sub-title, or by any law."

Under New Jersey law a licensing ordinance enacted as an exercise of the police power cannot be used for raising revenue and the fee is limited to the necessary or probable expense of issuing the license, and of inspecting and regulating the business the license covers. *Morgan* v. *Orange*, 50 N. J. L. 389, 391; *North Hudson Co.* v. *Hoboken*, 41 N. J. L. 71, 78-9, 81; *Dunn* v. *Hoboken*, 85 N. J. L. 79, 86; *Muhlenbrinck* v. *Commissioners*, 42 N. J. L. 364, 367-8; *Cape May* v. *Cape May Trans. Co.*, 64 N. J. L. 80, 84-5; *Gaynor* v. *Roll*, 79 N. J. L. 402, 403; *Clark* v. *New Brunswick*, 43 N. J. L. 175, 176-7.

An ordinance exercising the police power must have the object and effect of promoting public health, safety and general welfare, and if, as in this case, the license fee is in excess of that essential to effect the security of the public, it is an unconstitutional taking of private property for public use without compensation. *Passaic* v. *Patterson Bill Posting Co.*, 72 N. J. L. 285 (Ct. E. & A.); *O'Mealia O. A. Co.* v. *Rutherford*, 128 N. J. L. 587 (S. C.).

Cooley, on Constitutional Limitations, (2d ed.), page 201, lays down the basic rule as follows:

"The authority of the corporation will be limited to such a charge for the license as will cover the ne-

> cessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power; but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation."

In *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50, a state licensing and regulating act was held invalid as applied to the circumstances of that case. The state's contention that it had the right to enact laws for such licensing and regulation in the exercise of the police power in the interest of the welfare of its people, was overruled as applied to interstate commerce, even though the business regulated was located within the state (p. 59). The Court held (p. 59):

> "Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it."

In *Sprout* v. *South Bend*, 277 U. S. 163, the court criticized the license fee of $50. per year because it was not imposed as an incident, or to defray the expenses, of municipal regulation, and because it was not shown "that the amount collected under the ordinance was no more than was reasonably required for such a purpose." Then the Court said (pp. 169-170):

> "It follows that the exaction of the license fee cannot be sustained as a police measure."
>
> . . . . . .
>
> "It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city."

City of Philadelphia v. *Western Union Tel. Co.*, 40 Fed. 615, 617, involved the validity of a city ordinance licensing the privilege of maintaining telegraph wires within the city. The court held:

> "The plaintiff cannot tax the defendant,—not only because it is not authorized to do so, but because the state is without power to confer such authority. The imposition of a tax would be an interference with interstate commerce and thus be an infraction of the federal constitution. The plaintiff may and is in duty bound, to subject the defendant, and other similar companies to such proper conditions, restrictions, and supervision, respecting lines within its limits, as are necessary to the public safety, and consequently to such charges as will enable it to perform its duty, without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise it is not. Does it do more? The question in view of the evidence, (about which there is no disagreement), is too narrow to admit of discussion. A statement of the facts disposes of it. The experience of several years shows that $3,000 or at the most $3,500 per year is sufficient to cover every expenditure the city is required to make on this account. The ordinance imposes the payment (in round numbers) of $16,000 annually. This is five times the amount required. It seems to follow as a necessary consequence, that the ordinance is unreasonable. It compels a payment annually of about $14,000 in excess of the amount necessary. This is a tax pure and simple. The city cannot collect and lay by a sum to insure itself against imaginary future demands, which may possibly arise."

One of the most complete discussions on the reasonableness of licensing ordinances appears as a decision of the Virginia Supreme Court of Appeals, in *Williams* v. *Richmond,* 177 Va. 477, as reported in 134 A. L. R. 833. The following are extracts from that opinion (A. L. R. paging used);

(p. 839):

> "In 26 R. C. L., Taxation, sec. 17, appears this statement: 'When a legislative body having power to tax a certain subject matter actually imposes such a burdensome tax as effectually to destroy the right to perform the act or to use the property subject to the tax, the validity of the enactment depends upon the nature and character of the right destroyed. If so great an abuse is manifested as to destroy natural and fundamental rights which no free government could consistently violate, it is the duty of the judiciary to hold such an act unconstitutional.'
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> * * * * * *
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> (p. 840):
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> "The test, however, as has been pointed out before, is what may be done under the ordinance. It is clear that strict enforcement of sec. 166 would be a death blow to certain modest callings. This we cannot allow. We hold that sec. 166 is inimical to the due process clause of the Fourteenth Amendment of the Federal Constitution and to Article 1, sec. 1, of the State Constitution."

Many decisions of the federal courts discuss, and criticize, license fees that are excessive, as having no relation to the volume of services rendered, the use made of the licensed business or facility, the volume of business, gross

receipts, or revenue, from the enterprises, or to the expense of regulation.

A leading example of such decisions is found in *Western Union Telgr. Co.* v. *Texas*, 105 U. S. 460 465-6, where the court struck down a state license fee of one cent per telegram. After discussing *Phila. & R. R. C.* v. *Pennsylvania*, (State Freight Tax Case) 82 U. S. 232, 273 and six other cases in which an arbitrary license tax measured by a rate per ton of freight or per passenger were set aside, and *Steamship Co.* v. *Tinker*, 94 U. S. 238 (and two other cases) in which a license tax measured by the *measurement* of vessels were set aside for these reasons, the court held void the Texas license fee of one cent per telegram because it was not fixed according to the volume or value of the services rendered or involved, was without regard to the distance sent or the price received for messages, and was in no respect proportionate to the business done (105 U. S. 460, 465-6).

In *Union Tank Line Co.* v. *Wright*, 249 U. S. 275 (1919, McReynolds, *J.*) the court considered a tax levied under state law (Georgia) upon tank cars operated in interstate commerce. While it held that such cars used in the state were taxable as personal property in the state, it condemned the tax levy because the formula used produced results having no necessary relation to the value of the property (p. 283).

In *Ohio River & W. R. Co.* v. *Dittey*, 232 U. S. 578, the case involved the certification and collection of a tax upon the privilege of carrying on business in the state. It was contended that the tax was in excess of the value of the privilege and this point is discussed at pages 587-9.

The court said (p. 588) that the bill of rights imposed implied limitations upon the power of taxation of privileges and franchises and limited such taxation to the reasonable value of the privileges or franchises conferred originally, or to its continued value from year to year.

The court further said (p. 589):

> " 'These limitations prevent confiscation and oppression under the guise of taxation, and the power of such taxation cannot extend beyond what is for the common or public welfare, and the equal protection and benefit of the people; but the ascertaining and fixing of such values rests largely in the general assembly, but finally in the courts.' "

In *Great Northern R. Co.* vs. *Washington*, 300 U. S. 154, the court considered a tax on public utilities measured by a percentage of gross receipts. The act was defined by the Supreme Court of the state as a regulatory and inspection fee which was to be used as a fund solely for administering the state public utility commission law (p. 156).

In the application of the fund the state made no segregation of inspection and regulation but applied the money to a large number of other purposes (p. 159). The court stated the general established principle that in the exercise of the police power, the state may provide for supervision and regulation of public utilities and may exact the reasonable cost of such supervision and regulation from the utilities concerned, but it held (p. 160):

> "If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment.
>
> * * * * * *

"If the exaction be clearly excessive it is bad *in toto* and the state cannot collect any part of it." (p. 161).

Within those limits the court decided that no license tax could be exacted. It held that the tax could not exceed the cost of inspection and regulation. It held that the burden of proving that the tax was reasonable in that regard rested on the state or the parties imposing the tax and that that burden had not been sustained (pp. 165-8).

In *Murdock* v. *Pennsylvania*, 319 U. S. 105, 140, the court said:

> "The ultimate question in determining the constitutionality of a tax measure is—has the state given something for which it can ask a return?"

That case, and another, are cited in *Follett* v. *McCormick*, 321 U. S. 573, in which the court said:

(p. 575)

> "In those cases, the tax imposed was also a license tax—'a flat tax imposed on the exercise of a privilege granted by the Bill of Rights' and therefore an unconstitutional exaction. * * * We emphasized that the 'inherent vice and evil' of the flat license tax is that it 'restrains in advance those constitutional liberties' and 'inevitably tends to suppress their exercise' ".

(p. 577)

> "For, to repeat, 'the power to tax the exercise of a privilege is the power to control or suppress its enjoyment' ".

Following is a pertinent observation of the Court in *Philadelphia & R. R. Co.* v. *Pennsylvania,* 82 U. S. 232, 276 (about the third page of the opinion), quoted in *Helson* v. *Kentucky,* 279 U. S. 245, at page 250:

> "And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other states would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the state, may impose one of $5. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one state to another without being obstructed by the intervention of state lines."

Contrary to the principle declared in *Great Northern R. Co.* v. *Washington,* 300 U. S. 154, at page 168, that the state "must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the service rendered. The State failed to carry this burden"; the Court below held (R. 273):

> "There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here. There is not such disparity between the 'value of the privilege' and the levy as would render the ordinance arbitrary and discriminatory."

The "value of the privilege" was never shown, and the word "disparity" implies two comparates, neither of which are suggested in the opinion or in the record.

The only attempt made by appellees to support their burden of proof of the reasonableness of the license fee consisted of two different computations based on purely hypothetical areas or quantities of coal in storage, namely:

(a) To show that a hypothetical license fee (not stated as to amount) would not exceed, but might be less than, the amount of the tax formerly levied on the coal in storage (R. 188, 206-211, 220-222, 225-226, 229, 246-247). These computations afford no proof of reasonableness, but do serve as admissions of the fact that this license tax was designed solely as substitute revenue for the lost taxes on the coal.

(b) To minimize the amount of the license fee by computations based on hypothetical quantities of coal (R. 206-208, 220-222, 225, 226, 229, 246-247). The figures used were purely supposititious figures given to the witness by appellees' counsel (R. 221-222, 226-227), and the witness said he did not undertake to ascertan, and had no intention of, and was not interested in, ascertaining, the actual amount of coal involved, which he said, made no difference to him (R. 217-218, 220, 223-224, 227-228, 246-247).

These arbitrary calculations are meaningless, and utterly fail to show the reasonableness of the license fee, or of the ordinance as a whole.

(c) The ordinance is prohibitory.

It has already been shown that the only business subject to this ordinance is the storage business at Coalberg, and that it cannot earn enough to pay the license fee and

the plant would have to be closed (Ex. P-10 R. 49, 86-87, 137-138).

The important feature of this situation is, and the uncontradicted evidence establishes, the fact, that this license fee is so large that its necessary effect is to prevent the conduct of this interstate business within the municipality (R. 86, 138-139), and to cause the loss of property (improvements) valued for taxes at $113,400, which are useful for, or adapted to, no other purpose (R. 85). In that aspect of the situation, and in a very real sense, the ordinance amounts to a positive denial of the right to engage in that business and the destruction of the property for its only suitable purpose. A burden so heavy as to produce that result has been visualized and disapproved in *Southern R. Co.* v. *Reid*, 222 U. S. 424, 443, and *Helson* v. *Kentucky*, 279 U. S. 245, 250.

No question of necessary police, fire or health regulations are involved, since this plant conducts a business which is lawful in itself and presents no hazards to public safety, health or welfare. Consequently, the case does not present any of the problems, or fall within any of the classes, of cases which have sustained an exercise of police power to prohibit, or impose penalties or license fees so high as to discourage, the conduct of a business or occupation.

This ordinance prohibits the conduct of this business "unless and until there shall be granted by the Township Committee * * * a license to conduct said business" (R. 9). The ordinance does not require the Township Committee to grant a license, or specify any conditions upon which it

may refuse to grant it. No review of its action is provided in the ordinance if they refuse, or just fail, to do so. In these respects the situation, and possible results, are simillar to those in *Washington, ex rel &c.* v. *Roberge*, 278 U. S. 116, involving a municipal zoning ordinance of Seattle.

The court held:

(p. 121)

> "Legislatures may not, under the guise of police power, impose restrictions, that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities".
>
> * * * * * * *
>
> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home * * *is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare."

While that case involved a different kind of municipal ordinance, the above quoted rulings apply equally to the present case, which, likewise, involves inhibitions of the legitimate use of private property. There is no "legislative determination" in the present case that the Coalberg plant or its use "would be inconsistent with public health, safety, morals or general welfare."

The conviction of James Thompson was unlawful.

It is appropriate here to discuss the conviction of the employee, James Thompson, since the authorities and facts cited, apply equally thereto.

R. S. 40:52-1(g) empowers the municipality to license "all other kinds of business conducted in the municipality." Nothing is said about licensing the employees of persons or corporations conducting such businesses.

R. S. 40:52-2 authorizes the governing body to fix fees for licenses and to impose penalties for violation of ordinances for revenue (without specifying amounts).

Neither of these provisions relate to the employees of such businesses.

Section 1 of the ordinance (R. 9) provides that:

> "* * * no person, firm or corporation shall conduct or carry on the business of the storage of personal property in a warehouse engaged in storing goods for hire *or work in*, occupy, or, directly, or indirectly in any manner whatsoever, *utilize* any place or premises in which is conducted or carried on * * * (such business), unless and until there shall be granted by the Township * * * a license to conduct said business * * *"

Section 7 (R. 10) provides penalties for

> "Any *person*, firm or corporation who shall violate any term or provision of this ordinance * * *" (Italics ours.)

Appellant, James Thompson, was convicted and fined $200 and sentenced to jail for 90 days if the fine was not paid, because he "worked in, occupied or utilized" the Coalberg plant (R. 14).

At the time of his conviction he was one of six, formerly ten, (R. 89) employees at the plant. All of them are classed under Federal laws, as railroad employees in a transportation facility engaged in interstate commerce. *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446.

He was convicted and fined for working in the Coalberg plant for which his employer had failed to obtain a license from the Township of Saddle River.

Mr. Thompson did not conduct or carry on the business of storing coal at the storage plant. That was done by his employer. And Mr. Thompson did not use the plant. It was used by the Railroad Company and its agents, the Coal Company and Independent. The licensing power of the township is limited to the licensing of certain businesses in general and does not extend to employees of those engaged in the conduct of such businesses, whose work, except for the necessity of a license to conduct the business of the employers, would not be unlawful. The power to punish for violation of a municipal licensing ordinance of the present character applies only to those directly responsible for the conduct of the business for which a license is required, and not to employees whose only offense is that of the necessity of earning their daily bread in the pursuit of a legitimate occupation.

The object of the statute is to authorize the licensing of businesses, "and the places and premises in or at which

the business is conducted and carried on" (R. S. 40:52-1 (g)). It does not mention, or purport to apply to employees of the business. It was not the purpose of the statute, and it does not authorize municipalities, to require a license of each employee of a business, or to penalize an employee because his employer fails to comply with a licensing ordinance. Such a provision is not within the language, intendment or purpose of the statute. This ordinance amounts to penalizing an employee for the failures of his employer. Thompson is only one of six, formerly ten, employees at the Coalberg plant. Under this ordinance the Township may penalize each of those employees by a fine of $200 or by imprisonment for 90 days, or both, for each and every day from January 25, 1943 to the end of this litigation for *the failure of his employer* to obtain a license.

This feature of the ordinance unconstitutionally deprives Thompson of a legal right, in violation of the principles set forth in the heading of this point.

Thompson's conviction was, therefore, unlawful, and was properly set aside by the New Jersey Supreme Court because, if for no other reason, it was imposed outside the power of the Township of Saddle River.

With respect to the conviction of James Thompson the Court below held (R. 273):

> "And there is no merit in the contention that the municipality does not possess power under the cited enabling act 'to penalize an employee because his employer fails to comply with a licensing ordinance,' and therefore the conviction of the individual respondent, Thompson, cannot be sustained."

After citing the prohibition of the ordinance against any person to "work in, occupy, or, directly, or indirectly in any manner whatsoever, utilize any place or premises" in which the storage business is conducted without the prescribed license, the Court below continues (R. 273-274):

> "This is the offense of which Thompson was convicted. It was within the competency of the local legislative body to render this a punishable offense, essential to the enforcement of the policy of the ordinance; the power is an integral part of the general grant of authority to license and regulate contained in *sec. 40:25-1(g) and 40:52-2, supra.*"

Neither of the two cited sections of the statute confers such a power upon a municipality, and, certainly, no municipality has powers not granted by statute. The last quoted portion of the opinion of the Court below is contrary to every principle of reason, law and justice. If an employee can be lawfully convicted, fined and imprisoned for the default of his employer in matters over which he has no control, no employee can be safe from punishment. It is no answer to say that he, and all of his associates, must leave their legitimate employment and forego their means of livelihood, unless and until his, and their, employer has obtained a license. The doctrine that one person may be fined and imprisoned for the default of another is certainly alien to our system of law and justice.

III.

The ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful; (a) as to the amount of the license fee; (b) as to the discretionary power it purports to confer upon the members of the municipal governing body, and its officers and agents, and thereby denies to appellants the equal protection of the laws, in violation of the fourteenth amendment of the Constitution of the United States.

(Assignment of Errors, pfg. 3 (R. 283-285); Statement of Points, pgf. V, (R. 288)).

(a) As to the License Fee.

In *M. Kraus & Bros.* v. *United States*, 90 L. ed. Adv. Op. 653, U. S. (decided March 25, 1946) this Court set aside the convictions involved because the regulations promulgated by the OPA Administrator, upon which the convictions were obtained, were ambiguous. There the Court said:

(p. 657)

"In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to

bring the criminal penalties of the Act into operation. See United States *v.* Wiltberger, 5 Wheat. (U. S.) 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture."

* * * * * *

"But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express words of fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act."

In *United States* v. *Merriam*, 263 U. S. 179, the Court construed a tax statute. At page 188, it said:

"If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

In *Williams* v. *Richmond*, (134 A. L. R. 833), 177 Va. 477, the court stated that tax laws are to be liberally construed in favor of taxpayer, and that if there be substantial doubt, it must be resolved in his favor. The court said (A. L. R. paging used):

(pp. 836-837)

"One of the prime requisites of any statute is certainty, and this is especially true of a taxing

statute. It is said in 25 R. C. L., Statutes, § 307: It is to be fairly and justly presumed that the legislature, which possesses a power so comparatively unrestrained in its force and searching in its extent as the power of taxation, has so shaped the law as, without ambiguity or doubt, to bring within it everything that it was meant should be embraced. And the rule is expressed thus in 59 C. J., Statutes, § 160: Act imposing tax must, under the rules above stated, be certain, clear, and unambiguous, especially as to the subject of taxation and the amount of the tax.''

(p. 837):

''There is a particularly apposite statement in the early Texas case of Western Union Telegraph Co. *v.* State of Texas, 62 Tex. 630: 'it is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the tax-payer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected.' ''

See also *State* v. *Ashbrook*, 154 Mo. 375; *Commonwealth* v. *Pennsylvania W. & B. P. Co.*, 271 Pa. 456; *Interpretation of Statutes, Endlich*, p. 478.

Section 3 of the ordinance prescribed a license fee of three-quarters of a cent "for each square foot of the total ground area of the *place and premises* * * * *in or at* which said business is conducted or carried on" (R. 10). It is not confined to the area of land used in the storage business, and was not so construed in the complaints and convictions.

The ordinance requires a written application for a license, and that:

> "Said application shall also be accompanied with a deposit to cover the license fee for the current year in the amount hereinafter provided" (Sec. 2). (R. 10.)

The ordinance does not define the term "place or premises" in any way that would indicate to an applicant how much license fee he should submit with his application. Both are indefinite words. Exhibit P-17 (R. 60, 90) shows the radical fluctuations in the amount of coal in storage from year to year, ranging between a maximum of 160,000 tons on January 1, 1942, and a minimum of 12,000 tons on April 1, 1944. It is impossible to foresee how much coal will be mined in any one year, how much of it will be shipped via Erie, or how much will be sent to transit storage at Coalberg.

The record justifies the state of confusion in respect to what license fee is required by this novel ordinance:

(a) For the purpose of preparing the ordinance, the Township Engineer made, and reported, three different area calculations (R. 204-205, 217-219, 238-241, 246-247). An area of one and one-half million square feet including

railroad tracks regardless of their use (R. 249-250), was selected by him as best serving the purpose (at three-fourths of a cent per square foot) of producing a license fee ($11,250) approximating the lost taxes on the coal.

(b) In the complaint on which prosecutors were convicted, the Township officials construed the term "place or premises" at which the business was conducted as "Block 106-D" on the Assessment Map (R. 5), which contains 2,730,296 square feet, on which the license fee would amount to $20,475. That area included all tracks and 1,198,500 square feet of unoccupied land. (Ex. P-2, R. 18, 76).

(c) In his cross examination of Independent's President, Appellees' counsel intimated that a license application might have been made for 630,000 square feet of area (R. 146), which was the area of the coal "floors", only, and would require a license fee of $4,175. This is the smallest fee anywhere suggested in the record. That area, however, was obviously insufficient because it included only the floors upon which coal is piled, and did not include the additional areas occupied by other buildings, equipment and facilities necessary to the operation of the storage plant, and necessary to the use of that coal floor area. If only the area used for plant operations is included the annual license fee would be $12,545.97.

(d) When Appellants' attorneys sought to ascertain exactly who was to determine what area was intended by the term "place or premises" mentioned in the ordinance, they received only evasive answers such as are included in the following statement of Appellees' counsel who designed and prepared the ordinance:

"Mr. Minard: Who would make the determination for the purpose of making the licensing fee?

Mr. Chandless: You will find under section 1 or section 2, to make an application and ask for a license for a given area; you can ask for forty or fifty square feet, if you want it.

Mr. Minard: Who determines the licensing fee? Could the operator of the plant say that he wants a license fee for 100,000 square feet?

Mr. Chandless: Yes. * * * If he uses more than that 100,000 feet he might be convicted before a recorder * * * of using premises unlicensed. * * * By the same token, if you get your license, for the area that you want it, and then you went and stored coal outside of that area, you then would come under proper proceedings and you would be convicted of violating the ordinance because you were storing coal in premises not licensed, so far as you extended beyond the area prescribed by the ordinance" (R. 246).

The trouble with that "explanation" is that the ordinance does not confine the licensed area to that used for "storing coal." It applies to the "place or premises" where the business is conducted.

That explanation bluntly states that an applicant must, on January 1 of each year, speculate, at the peril of fine and imprisonment, how much area an unpredictable volume of business will require during the succeeding year. The employees of the business are in an equally helpless situation. That explanation of counsel puts the ordinance in the class of a trap, since, if an unexpected amount of coal should suddenly arrive, it could not be unloaded until the operator had rushed to the Township for additional licensed area and paid another license fee.

A common carrier cannot refuse shipments or tariff services without being liable for consequential damage.

The court below suggests (R. 273):

> "And under the ordinance in the case at hand, the warehouse corporation may protect itself against the inclusion of areas not devoted to storage in the calculation of the tax."

That suggestion is not helpful, since the ordinance does not limit the licensee to areas "devoted to storage", and if, when the application was presented, the Township Committee thought enough tax had not been offered it could withhold the license. If, afterwards, it thought more revenues should be obtained, it could revoke the license, or if it thought that more than the licensed area was being used it could prosecute the licensee (R. 246). Hence, the matter does not rest in the hands of the applicant, and it cannot "protect itself against the inclusion of areas". The Township Engineer's idea of the storage area was 1,500,000 square feet, which included all railroad tracks of N. Y. S. & W. railroad as well as those used for access to the storage plant, (R. 249-250). He selected that area as his opinion of the area used for storage and handling purposes. He admitted that there might be a difference of opinion as to the correct area, but he stated that that was up to the Township Committee to decide (R. 217-219). When the Township Committee did decide, it prosecuted, and convicted, Independent and Thompson on the basis Block 106-D, containing an area of 2,730,296 square feet (R. 7), which included, not only all of the railroad tracks included by its Engineer but also, 1,198,500 square feet of entirely vacant and unused land (Ex. P-2, R. 18, 76). That area would require an annual license fee of $20,475.

The Comptroller of the Coal Company (R. 86) testified that since there is nothing in the ordinance limiting the area to be computed to the actual area occupied by stored coal, buildings and equipment, it might be construed by the Township officials to apply to the entire area of the property, 67.25 acres, or 2,929,410 square feet, resulting in an annual license fee of $21,970.57. He also testified (R. 101) that he didn't know how many square feet are necessary to store the coal.

The President of Independent testified (R. 145) that he did not know what area is actually used for storage purposes.

The Court below held (R. 273):

> "There is a presumption that the tax is reasonable in amount; and the burden rests upon the challenger to overthrow that presumption. It has not been sustained here."

thus overruling the New Jersey Supreme Court which held that the ordinance was "an unreasonable, arbitrary, capricious and discriminatory exercise of the licensing power" (R. 256).

In the light of so much confusion and uncertainty on the part of the draftsman of the ordinance, the Township Engineer and the Township officials who have construed it in the complaints, as to the meaning of the ordinance, it is obvious that an applicant for a license could not be better informed. He could not obtain a license until his application had been approved by the Township officials, and they have construed the ordinance as applicable to the whole of Block 106-D. From this conflict of construction among

the Township officials, the uncertainty of the ordinance in this respect, is clearly demonstrated.

From these provisions and actions it is clear that the ordinance is construed to give to the Township Committee the discretion to determine the area to be used in computing, and thus determine the amount of, the license fee, without any controlling definition, rule or guide as to the extent of the "total ground area" to be measured by the unit square foot rate.

It is easily conceivable that the members of one Township Committee may at one time, as they have done in the present complaints, arbitrarily decide upon a given area, and that the same, or different, members of the Committee in office in the next, or any succeeding, year may decide upon a different area, and that the licensee may, by means of such variations, easily become the victim of schemes to increase the public revenue by such means, without any new ordinance being enacted for that purpose, and no notice of the increase. Prosecutors would never know, from one year to the next, what the license fee would be for any year.

With the discretionary opportunities above mentioned, this storage business at Coalberg can be operated only, and entirely, at the mercy of the whim, or discretion, of a governing body possessing the avowed purpose of circumventing a successful tax contest.

> "It is a well-recognized principle that the test of the validity of an ordinance is not what has been done but rather what may be done under its provisions. *Richmond* v. *Model Steam Laundry*, 111 Va. 758, 69 S. E. 932;" *Williams* v. *Richmond*, 14 S. E. (2d) 287, 134 A. L. R. 833, 838.

An ordinance which is susceptible of such a variable exercise of discretion, and opportunity, in fixing, and altering without notice, the amount of the annual license fee, with the possibility of such a wide variance in amounts, is clearly indefinite, and should be declared void.

A tax statute, or an ordinance, which imposes upon the taxpayer the responsibility of making his own calculation of the amount of his tax obligation, at the risk of error on essential features which are admittedly subject to honest differences of opinion (R. 219), and at the peril, not only of being deprived of the right to conduct his business for lack of a license but also of fine and imprisonment as a consequence of such a difference of opinion, is patently ambiguous, unreasonable, and capricious, and denies to that taxpayer the equal protection of the laws and due process of law, in violation of the Fourteenth Amendment of the Federal Constitution. Under such circumstances there can be no justifiable "presumption that the tax is reasonable in amount," because the amount of the tax is not specific and definite, and no one has determined, or knows for a certainty, the correct "amount" of the tax.

(b) Discretionary Powers.

Section 1 of the ordinance (R. 9) forbids the conduct of the business, or to work in, occupy or utilize the place or premises where it is conducted or carried on "unless and until there shall have been granted by the Township Committee * * * and shall be in force and effect, a license to conduct said business for the place or premises in or at which said business shall be conducted or carried on."

The granting or withholding of a license, therefore, rests within the sole discretion, and whim, of the Township Committee, consisting of three members (*R. S. 40: 146-1*).

Section 3 of the ordinance (R. 10) provides:

> "The Township Committee may revoke any such license for sufficient cause after notice and hearing."

No rules, regulations for, or conditions precedent to, the exercise of this power of revocation are prescribed, for the information of the licensees. It, therefore, rests within the power of the Township Committee at any time to revoke an ordinance once granted for whatever "cause" the majority of the members deem satisfactory. There is no provision in this, or any other, ordinance, or under any law, entitling the licensee to a refund of any part of the license fee in case of revocation.

These are arbitrary powers, and may be arbitrarily exercised at any time. In these respects the ordinance is indefinite, uncertain, arbitrary, unreasonable and unlawful.

The ordinance is so drawn as to repose in the Township Committee the uncontrolled discretion to determine for themselves whether the amount of the license fee offered with the application is adequate, according to its notion, before it is determined what land area should be included in the computation of the license fee; and to grant or deny the application, according to their individual notions, or motives, without any expression of reasons for a denial if that course should be taken. While such a dispute was being settled by litigation, the operation of the business must be discontinued, or continued at the risk of heavy

cumulative penalties. But, before the transit facilities and services could be discontinued it would be necessary for Erie to file a new tariff with I. C. C. cancelling the storage in transit provisions of the present tariff. Under the provisions of Sec. 15 (7) of the Interstate Commerce Act (49 U. S. C. A.), I. C. C. could, on complaint of a shipper or on its own motion, suspend the tariff proposing termination of the transit services and Erie would be compelled by law to continue the business, despite the fact that no license had been obtained for the conduct of the business. This sharp conflict between the provisions of the ordinance requiring, as a condition precedent to the conduct of the business, the obtaining of a municipal license and the pre-payment of a license fee, and the provisions of the Interstate Commerce Act illustrates the vice inherent in the situation confronting Erie under this ordinance.

The ordinance is also indefinite and uncertain because it gives discretionary power to revoke a license granted thereunder, without prescribing any rules or regulations, governing the exercise of that power, applicable to all licenses.

Where a discretionary power is conferred by statute, it is necessary to prescribe in the ordinance uniform rules and regulations, applicable to all persons, governing the exercise of such power. None are prescribed in this ordinance.

In these respects, this ordinance violates the rules established in *Yick Wo* v. *Hopkins*, 118 U. S. 356 and *In re Wo Lee*, 26 Fed. 471.

One who applies for and obtains such license, and pays the large license fee, has no assurance that his license may

not be revoked in the discretion of the Township Committee, uncontrolled by any specified uniform rules or regulations applicable to all licensees.

The general rule is stated in *33 Am. Jurisp.* Sec. 66, page 382, as follows:

> "The generally accepted principle is that license legislation which vests in public officials a discretion to revoke a license to carry on an ordinarily lawful business, profession, or activity without prescribing definite rules and conditions for the guidance of the officials in the execution of their discretionary power is invalid."

It is not enough to provide, as this ordinance does, that the discretion to revoke a license shall be "for sufficient cause after notice and hearing", without first prescribing in the ordinance the terms, conditions, rules and regulations, or the acts of violation, which constitute a "sufficient cause" applicable to, and determinable in advance, by all persons alike.

There is nothing to prevent the Township Committee from granting a license and collecting a license fee for revenue, up to $20,475. and, at any time thereafter, revoking the license, on any pretext, or ground which a majority of its members might choose to regard as "sufficient cause". Such action might, and in the absence of previously prescribed conditions for revocation would of necessity be, purely arbitrary. No important business can be lawfully subjected to such hazards. In such a case, what would happen to the coal in storage at Coalberg, under shipping contracts and the outstanding negotiated warehouse receipts?

Such action would destroy the only available use of the Coalberg plant and leave prosecutors without any means of recovering back any part of the license fee, and expose Erie to the risk of shippers' damage suits, and the severe penalties of the Interstate Commerce Act for failure to continue these in-transit storage facilities *(49 U. S. C. A., Sec. 10.)*

As elsewhere stated, on ample authority, the test of the validity of an ordinance is what may, and not what has been, done under it.

Such a prospect would be sufficient to discourage an enterprise of this character, perfectly legitimate, useful and harmless in its nature, and amounts to a denial of the legitimate use of private property.

Under the circumstances above described the ordinance is a trap, and the discretionary power here reserved has no proper relation to the purposes of the enabling statute or to any legitimate purpose of this ordinance.

The power to deny the application, and the unlimited power of revocation standing, as they do, as a threat to all who may apply for licenses thereunder, constitutes an important feature which renders the ordinance arbitrary and unreasonable.

IV.

The ordinance exposes appellants to, and imposes, excessive fines and penalties and thereby denies to appellants due process of law and the equal protection of the law, in violation of the fourteenth amendment of the constitution of the United States.

(Assignment of Errors, pgf. 3(e) (R. 284); Statement of Points, pgf. VI (R. 288)).

In overruling this contention, the Court below said (R. 274):

> "The penalty prescribed for a violation of the ordinance is imprisonment for a term not exceeding 90 days, or a fine not exceeding $200, or both, with an additional provision that each day during which a violation 'shall continue shall constitute a separate offense;' that the magistrate may, in his discretion, imprison one so convicted for a term of not exceeding 90 days, 'in default of the payment of any fine;' and that execution may issue against goods and chattels to recover an unpaid fine.
>
> We are not called upon to determine the validity of all these sanctions. A fine of $200 was the penalty imposed upon each of the convicted respondents, Independent Warehouses, Inc. and Thompson; and a fine in this amount coupled with imprisonment for 90 days cannot reasonably be deemed excessive in constitutional intendment. Vide., R. S. 40:49-5. The ordinance contains a provision that in case 'any section or part' thereof shall be held illegal or unconstitutional, such invalidity 'shall not be construed as impairing the force and effect of the remainder of the ordinance.' If it be conceded arguendo that the

cumulative penalty clause is invalid in whole or in part, the remainder of the provision for sanctions is severable and would stand unaffected."

Except for the penalty provision, this ordinance is impotent and unenforceable. Since it was the convictions and penalization of Independent and James Thompson that was directly under review, the validity of section 7 of the ordinance (R. 11), providing these enforcement and penalty provisions, was a determinative question necessary for sustaining the convictions and penalties, and is the essence of the validity of these convictions.

The severability provision of section 8 of the ordinance (R. 11) provides:

"In the event that any section or part of this ordinance shall be held illegal or unconstitutional, such invalidity shall not be construed as impairing the force and effect of the remainder of the ordinance."

If Section 7 was held to be invalid the convictions and penalties under direct review could not be sustained. Hence, the validity of that section was necessary to a proper determination of the case before the Court below, and it was its duty to pass upon this issue.

In *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, the court said:

(p. 152)

"But the defendant insists that the general allegation in each of its answers; namely, that the statute besides being void as a regulation of interstate commerce, was in violation 'of various other provisions' of the Constitution of the United States, was suffi-

cient to have enabled him, at the trial, to insist that the statute upon which the actions were based was repugnant to the 14th Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for non-suit, or in some other way, distinctly claimed that the statute on which the actions were based was inconsistent with that Amendment, *then it would have been the duty of the court of appeals* to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 U. S. 442, 447, 44 L. ed. 839, 841, 20 Sup. Ct. Rep. 687, 689, 'the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, *in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state*'." (Italics ours.)

* * * * * * *

(p. 153)

"So, if the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the Constitution, treaties, or laws of the United States, or denies a right, privilege, or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute, or authority exercised under the United States, this court could

review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court."

* * * * * * *

(p. 154)

"'Of course, if upon examining the record this court had found that a Federal question was properly raised, or that a Federal right or immunity was specially claimed, in the trial court, *then our jurisdiction could not have been defeated by the mere failure of the highest court of the state to dispose of the question so raised, or to pass upon the right or immunity so claimed.*" (Italics ours.)

Section 7 of the ordinance (R. 11) provides, *without the authority of any New Jersey statute*, that "Each day that a violation of any of the terms or provisions of this ordinance shall continue shall constitute a separate offense," and that failure to pay a fine subjects the "person" offending to a compounded *additional* 90 days imprisonment for each offense. The ordinance also provides for execution on the goods and chattels of any person, firm or corporation convicted of violation to satisfy the amount of the fines imposed. Thus a person may lose *both* his estate and his liberty, for the same offense.

This cumulative penalty provision presents threatened monthly aggregations of fines amounting to $6,000 for Independent, the Coal Company and the Railroad Company compounded at the rate of $200 per day, plus execution against the violator's estate for each compound penalty incurred, and 2,700 days of imprisonment for each of their

officers and employees, while this ordinance is being contested,

The only statutory authority for penalties of $200 fine, or 90 days' imprisonment, is found in R. S. 40:49-5 which relates only to ordinances adopted under the authority of sub-title 49 (R. S. 40:49-1). That section has no application to revenue licensing ordinances, which are authorized by the separate and distinct authority of sub-title 52.

16 Corpus Juris Secundum, page 1107:

> "*Excessive or unreasonable penalties.* The imposition of an unreasonable penalty constitutes a denial of equal protection of the laws. A statute which subjects persons or corporations to such excessive or unreasonable penalties for its violation as to intimidate such persons or corporations and to deter them from contesting the validity of the statute in the courts is void as a denial of the equal protection of the laws."

12 Am. Jur. p. 251 states that if the legislature, in an endeavor to prevent challenge of a law provides for such excessive penalties that the party affected is necessarily intimidated and submits, rather than risk penalties in testing it, such a law may deprive a person of the equal protection of the laws.

In *Wadley S. R. Co.* v. *Ga.*, 235 U. S. 651, 662, the court said:

> "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law, since it punishes for an act done when the

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legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must, at his own risk, pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid."

The court held that (p. 667), in considering whether the penalty is excessive, the constitutionality is not to be decided by the conduct of the plaintiff in error nor "by the fact that the state only asked for a penalty for one day's disobedience instead of many."

In *Ex Parte Young*, 209 U. S. 123, the court found that the penalty was so high that the railroad would have difficulty in finding employees to carry on its affairs (p. 145), and that the result precluded a resort to the courts. The essence of the decision on this point is contained in the following quotation:

(p. 145):

"Coming to the inquiry regarding the alleged invalidity of these acts, we take up the contention that they are invalid on their face on account of the penalties. For disobedience to the freight act the officers, directors, agents, and employees of the company are

made guilty of a misdemeanor, and upon conviction each may be punished by imprisonment in the county jail for a period not exceeding ninety days. Each violation would be a separate offense, and, therefore, might result in imprisonment of the various agents of the company who would dare disobey for a term of ninety days each for each offense. * * * It would be difficult, if not impossible, for the company to obtain officers, agents or employees willing to carry on its affairs except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided for in violating orders of the commission. The company, in order to test the validity of the acts, must find some agent or employee to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity."

(p. 163). It was suggested that the law could be disobeyed once and then tested, the law being obeyed, meanwhile. The court observed that several years might elapse before there could be a final determination and if the law was invalid, the property of the company (as in the present case) might have been taken with no possibility of its recovery. The court held that to run the risk of heavy penalties and then seek a review should not be required of the company. Injunction against enforcement was held proper until the validity is determined.

Edwards & Browne Coal Co. v. *City of Sioux City*, 213 Ia. 1027, 240 N. W. 711, involved an action in equity to restrain the city from enforcing an ordinance licensing com-

panies storing oil for sale. Penalties of not over $100, or a prison term of not over 30 days, were provided. Each day constituted a separate offense.

The court held that the ordinance was void because its penalties were excessive.

In *Federal Trade Commission* v. *Millers' National Federation*, 23 Fed. (2d) 968, an injunction was sought to set aside subpoenas *duces tecum* issued by the Commission. One of the questions involved was the jurisdiction of the court of equity to restrain threatened enforcement of criminal penalties on the ground that the terms of the statute were such that the only avenue open to test its validity was through disobedience and therefore a denial of a hearing and lack of due process. The court held that if the statute in that case compelled the individual to subject himself to criminal prosecution, as a condition precedent to inquiry into the power or jurisdiction of the commission to act, it amounts to a deprivation of equal protection of the laws, citing and quoting from *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 102.

The penalty imposed by the act was a forfeiture of $100 per day for disobedience. The court said (p. 971):

> "A corporation is not required to subject its agents or officers to such a hazard as a condition precedent to its right to be heard in a court of justice."

It also mentioned the difficulty which might arise in finding employees or agents who would risk the penalty.

Ex parte Young, 209 U. S. 123, and *Terrace* v. *Thompson*, 263 U. S. 197, are cited as authorities.

The fact that cumulative penalties were not imposed on any of these appellants, or their officers and employees, does not affect this point, since the test of the validity of the ordinance is not what has been done, but rather what may be done under this provision, *Richmond* v. *Model Steam Laundry*, 111 Va. 758, 69 S. E. 932; *Williams* v. *Richmond*, 14 S. E. (2d) 287, 134 A. L. R. 833, 838; *Spann* v. *Gaither*, 52 Md. 1, 136 Atl. 41, 45; *Edwards & B. Coal Co.* v. *Sioux City*, 213 Iowa 1027, 240 N. W. 711; *Ulman* v. *Baltimore*, 72 Md. 587, 609, 11 L. R. A. 224, 227; 37 *Am. Jur.* sec. 156, page 768.

Those who conduct, or are employed in, this business are constantly exposed to additional penalties under this cumulative provision, and wholesale complaints, and convictions, are possible at any time.

V.

The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court, and in affirming the judgments of conviction of appellants, Independent Warehouses, Inc., and James Thompson, by William Scheele, Recorder of the Township of Saddle River.

(Assignment of Errors, pgf. 1 (R. 281), Statement of Points, pgfs. I to IV, inclusive, and V. and VI (R. 287-288).)

For the support of this point, appellants rely upon the facts, arguments and authorities above set forth under points I to IV, inclusive, of this brief.

Conclusion.

For the reasons above set forth, appellants pray that the judgments of the New Jersey Court of Errors and Appeals here under review in the above entitled causes be reversed, and judgments entered in favor of appellants.

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